United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4141

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ITT CONTINENTAL BAKING COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

TED BATES & COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petitions to Review an Order of the
Federal Trade Commission

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED [1/]

I. Whether the finding of the Federal Trade Commission that ITT Continental Baking Company, Inc., and Ted Bates & Company, Inc., have engaged in deceptive advertising in violation of Sections 5 and 12 of the Federal Trade Commission

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1/ These petitions previously were before this Court but were transferred to the Court of Appeals for the District of Columbia Circuit where a prior petition to review the cease and desist order had been filed. Upon dismissal of the prior petitions the District of Columbia Circuit re-transferred these petitions here. Consumer Federation of America v. Federal Trade Commission, 515 F.2d 367 (D.C. Cir. 1975).

Act is supported by substantial evidence and rests upon issues fairly tried.

II. Whether the order issued by the Federal Trade Commission to cease and desist is reasonably related to the violations found.

COUNTERSTATEMENT OF THE CASE

The facts with appropriate references,[2] may be summarized as follows:

1. The advertising campaigns

From 1964 to 1970 ITT Continental Baking Company, Inc. ("ITT") and Ted Bates & Company Inc. ("Bates") disseminated a series of advertisements known as the "Wonder Years" campaign and from 1970 to January 1, 1971, they disseminated a series of advertisements referred to as the "How Big" campaign. (App. 494.)[3]

2/ References to the pages of the record before the Commission in this brief will be to the joint appendix (App.) filed with the Court of Appeals for the District of Columbia Circuit and approved for use in this Court.

3/ ITT claims that some of the advertising questioned by the Commission had previously been approved by the Commission (Brief of ITT at 4). This appears to relate to the Commission's approval of advertisements prior to 1964 which typically included the slogans: "Wonder Bread helps build strong bodies eight ways," and "Wonder Bread helps build strong bodies twelve ways." (Id.) The latter slogan was approved by the Commission prior to being used (App. 519-21) because Continental Baking Company had previously stipulated with the Commission that it would not make certain nutritional claims in its advertising. (App. 422-24; 522.)

(Continued on following page)

From 1962 to 1970 ITT's yearly advertising expenditures for Wonder Bread ranged from slightly over $7 million to over $9.3 million a year. (App. 497.)[4/] From 1964 to 1971 ITT's yearly sales of Wonder Bread ranged from $134 million to $176 million. (App. 499.) Prior to 1971 about half the advertising commercials disseminated by ITT and Bates in the "Wonder Years" and "How Big" campaigns appeared on children's programs. (App. 392.)[5/] Most of these advertisements on children's programs contained the growth sequence that was the heart of the "Wonder Years" and "How Big" campaigns. (App. 390, 392-93.)[6/] Other advertisements, not containing the growth sequence, also appeared on children's

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3/ (Continued from preceding page)

The stipulation with Continental Baking Company is reported at 51 F.T.C. 1430 (1954). Neither slogan was challenged in the complaint. From 1962 until January, 1965, the Commission investigated Wonder Bread's advertising campaigns centered around the slogan "Wonder Bread Builds strong Bodies twelve ways" and a series of advertisements having to do with the manner in which Wonder Bread was manufactured. (App. 522-30.) The investigation of these two subjects was closed because "further action is not now considered warranted in the public interest . . . ." (App. 530.)

4/ The advertising for Hostess products challenged in the complaint lasted from September 15, 1970, to May 10, 1971. (App. 388.) The total expenditure for this campaign was $3,389,889. (App. 500.)

5/ Because it is cheaper to purchase advertising time on children's television, less than half the advertising budget was spent on children's advertising. (App. 389; see also App. 531.)

6/ The growth sequence depicted a child rapidly going through four stages of preadolescent development. See infra, pp. 6-11, for a more complete description.

programs. The "Wonder Years" and "How Big" advertisements containing the growth sequence also appeared on adult programs at this time. (App. 508.) ITT and Bates stipulated that the viewing audience for these adult programs included a significant number of children twelve years of age and under. (App. 516.)

ITT received notice that the Commission was investigating the advertising of Wonder Bread, Hostess Cakes, and Profile Bread in March (App. 385) or July, 1970 (App. 401).[7/] Several months after the complaint was issued ITT ceased nutritional advertising for Wonder Bread. (App. 385.) Advertising "directed" at children apparently ceased in July, 1970. (App. 386-87.)

2. The complaint issued in FTC Docket No. 8860

The Commission issued a complaint charging ITT and Bates with making certain misrepresentations in their advertising of Wonder Bread and Hostess Snack Cakes.[8/] (App. 14-34.)

7/ The Commission also alleged misrepresentations with respect to another ITT product, Profile Bread. The Profile Bread aspect of the case was settled by consent order (FTC Docket No. C-2015, 79 F.T.C. 248 (1971); App. 279.)

8/ Paragraph 12 of the complaint set forth certain Hostess Snack Cake advertisements; Paragraph 13 alleged that these advertisements made certain representations; Paragraph 14 alleged that these representations were false; and Paragraph 15 alleged that the advertisements, in addition to being false in making unqualified claims that the products had "good nutrition," unfairly exploited the guilt feelings of mothers. (App. 23-26.) Since the Commission dismissed these charges further discussion of them is unnecessary but the reasons for dismissal are relevant (p. 20, infra.)

Paragraph 7 of the complaint set forth certain representative advertisements for Wonder Bread. (App. 16-21.) Paragraph 8 in substance alleged these advertisements to represent, directly and by implication, that Wonder Bread: (a) is "an outstanding source of nutrients, distinct from other enriched breads;" (b) will provide all the nutrients essential to healthy growth and development; (c) can be relied upon by parents to provide all these essential nutrients; (d) is the optimum contribution that a parent can make to a child's nutrition during the formative years of growth by providing it to him; (e) provides complete protein of high nutritional quality necessary to assure maximum growth and development. (App. 21.) 9/

Paragraph 9 charged that all these representations were not true and that the advertisements therefore constituted "false advertisements" as that term is defined in the Federal Trade Commission Act. (App. 22-23.)

Paragraph 10 charged ITT and Bates with falsely advertising Wonder Bread as an extraordinary food for producing dramatic growth in children and thereby exploiting them. Specifically it charged:

> Certain of the aforesaid advertisements are addressed primarily to children or to general audiences which include substantial numbers of

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9/ Both ITT and Bates stipulated that these representations were not true, but denied that the advertisements made these claims. (App. 496; 503-04.)

children, which advertisements tend to exploit the aspirations of children for rapid and healthy growth and development by falsely portraying, directly and by implication, said Wonder Bread as an extraordinary food for producing dramatic growth in children.

Therefore, the aforesaid acts and practices of respondents were and are false, misleading, deceptive and unfair. [App. 23.]

Paragraph 11 charged ITT and Bates with falsely advertising Wonder Bread as a "necessary food" for children to grow and develop, thereby exploiting the concern of parents for the healthy physical and mental growth and development of their children.

3. The Commission proceedings

The Commission found the "Wonder Years" and "How Big" advertisements falsely portrayed Wonder Bread as "an extraordinary food for producing growth in children." (App. 218.) Petitioners challenge the Commission's findings as to what the advertisements in these two campaigns represented. For that reason we set forth the following Commission finding, in pertinent part, of the literal content of the advertisements:

Respondents' 60-second commercial entitled "Cardboard House" is typical of the ads appearing in respondents' Wonder Years compaign. (CX 9, film and CX 23, photoboard) 5/ It depicts several young childern playing in a cardboard house. The commerical opens with with the announcer stating:

5/ See CX 11 and 25 (60-second commercial, "Kites") and their 30-second shortened counterparts, CX 10 and 24 ("Cardboard House"), and 12 and 26 ("Kites"). The description of this commercial appearing in the text follows closely the law judge's description of its 30-second counterpart. (FF 13(c))

> These are the "Wonder Years," the formative years one through twelve when your child develops in many ways, actually grows to 90% of her adult height.
>
> * * *
>
> To help make the most of these "Wonder Years," serve nutritious Wonder Enriched Bread. Wonder helps build strong bodies 12 ways. carefully enriched with foods for body and mind, Wonder Bread tastes so good, and it is so good for growing child, for active adult.

While the announcer is talking, the TV screen shows a child eating Wonder Bread and then actually growing rapidly from a very young child to a twelve-year-old. While this visual rapid growth is taking place before the viewer's eyes, first the word "protein," then "mineral," then "carbohydrates," and finally "vitamins," are flashed in rapid succession above the growing child, each one coinciding with each growth sequence depicted. This visual depiction of the child growing while eating Wonder Bread appears twice in the 60-second commercial. 6/ When it appears the second time, the announcer asserts that "each slice of bread supplies protein for muscle, minerals for strong bones and teeth, carbohydrates for energy, vitamins for nerves, all vital elements for growing minds and bodies." The commercial ends with the announcer urging parents:

> to help make the most of her "Wonder years," her growth years, serve Wonder Bread. Wonder helps build strong bodies 12 ways.

Essentially the same message appeared in respondents' print ads and radio commercials disseminated as part of its Wonder Years campaign. 7/

6/ It appears only once in respondents' 30-second version of this commercial.

7/ Respondents' print ads appeared in national magazines and newspapers. They showed still-life pictures of children at play and included various representations also made in the challenged television commercials from the Wonder Years campaign such as, "Make the most of their 'Wonder Years,'" "You can do the most for your children's growth during their 'Wonder Years' - ages one through twelve." (FF 13(1)(g) and CX 28 and 28(a): FF 13(1)(i) and CX 30 a-d) This message was also contained in a series of radio commercials. (FF 13(1)(f), 18, CX 172 § 2, and Bates Ans., First Defense § 7)

Respondents' "How Big" campaign which was introduced in 1970 to replace the Wonder Years campaign contained essentially the same representations with greater emphasis on the theme "How Big" instead of the "Wonder Years." Four of respondents' commercials in the "How Big" campaign were described by the law judge as follows.

These commercials open showing a young child with "HOW BIG DO YOU WANT TO BE?" over-printed. The announcer says, "Wonder asks, how big do you want to be?" Various children answer as they are photographed:

> "Big enough so that the barber won't have to cut my hair in a baby's chair," Big enough to be a cheerleader," "Big enough to sink a basket," "Big enough to touch the ceiling myself," "Big enough to dance with my girl-friend," "Big enough to go surfing," "Big enough to wear my daddy's shoes," "Big enough to see the parade," "Big enough to ride a two-wheeler," "About ten times bigger than my sister," "Big enough to reach things without a chair," and "Bigger than George, he's my dog."

After the children have told how big they want to be, the announcer states:

> He'll never need Wonder Bread more than right now, because the time to grow bigger and stronger is during the Wonder Years - ages one through twelve - the years when your child grows to ninety percent of his adult height.

During this audio message, the same Wonder Years visual growth sequence is used and the child is pictured on the screen actually growing from a very young child to a twelve-year-old.

Then the audio portion continues:

> How can you help? By serving nutritious Wonder Enriched Bread. Wonder helps build strong bodies twelve ways. Each delicious slice of Wonder Bread supplies protein for muscle, minerals for strong bones and teeth, carbohydrates for energy, vitamins for nerves. All vital elements for for growing minds and bodies.

Again the child is shown actually growing from a very young child to a twelve-year-old, and the commercial ends with parents serving the child Wonder Bread and the audio stating:

> During the Wonder Years - the growth years - help your child grow bigger and stronger. Serve Wonder Bread. Wonder helps build strong bodies twelve ways. 8/

The "How Big" advertising message also appeared in national magazines. 9/

Respondents' "How Big" campaign also included television advertisements which appeared on two children's programs, Captain Kangaroo and Bozo Circus. (FF 147, CX 59, Richel Tr. 2731-2735) Respondents admitted and the law judge found that the following audio from one of these advertisements is representative of all the ads aired on the Captain Kangaroo show (CX 173, § 4; FF 13(e)):

Captain Kangaroo:	Mr. Moose, I have an interesting question for you. If you could be as big as you wanted to be . . . how big would you want to be?
Mr. Moose:	Gee . . . as big . . . as big . . . I know. As big as a tree. Then I could see <u>everything</u> around me for miles and miles.
Captain Kangaroo:	Wouldn't that be fun, Mr. Moose.
Mr. Moose:	Yes. Do you think eating Wonder Bread would get me that big?

8/ Four "How Big" 60-second commercials containing this same message but in different outdoor settings are in the record, CXs 1, 14 ("Surfing"), CXs 2, 16 ("Basketball"), CXs 4, 18, ("Bike-Trike"), and CXs 7, 21 ("Interviews"). Their 30-second counterparts containing essentially the same text but showing the actual growth of the child sequence only once are contained in CXs 15, 3, 17, 5, 6, 20, 1, 21, 85 and RX 49.

9/ CX 44.

Captain Kangaroo: Well . . . not quite as big as a tree . . . but Wonder does help boys and girls grow up big and strong, and give them energy for work and play. Each slice of Wonder is baked with vitamins and other good things that help you grow.

Mr. Moose: And Wonder tastes so good, too.

Captain Kangaroo: It does indeed--it's so light and tender and white, baked soft just the way you like it best. Great for lunchtime sandwiches . . . and anytime snacks. You'll want to enjoy Wonder Enriched Bread soon. Mother, please look for the red, yellow, and blue balloons printed on every wrapper. Remember, Wonder helps build strong trees--uh, bodies 12 ways. 10/

10/ Similar "How Big" advertisements for Wonder Bread were also aired on the local children's program "Bozo Circus" in Chicago, Illinois for 13 weeks in 1970. (CX 175 § 2 and 3) The Bozo Circus campaign contained essentially the same nutritional claims. The following audio from one of the advertisements appearing on "Bozo Circus" is representative of all of them. (CX 172 § 3, FF 13(d)):

UNCLE NED: Say, how many of you would like to grow up to be as big as an elephant? That's pretty big, isn't it? And, of course, no one really wants to be quite that big. But you are going to do a lot of growing in the next few years, and it is fun thinking about how big you'll be. You know, one thing that's so important to your growing is the kind of food you eat. You need to eat the right kinds of food. Yes . . . foods that are good for you, like Wonder Enriched Bread. Because Wonder is baked with vitamins and other good things that help you grow up big and strong and have energy for worktime and playtime fun. And you know what fun Wonder is to eat. Yes, just look at this delicious Wonder Bread sandwich . . . so

(Continued on following page)

a. The evidence relevant to the violation found

Both the Administrative Law Judge (App. 306) and the Commission viewed representative samples of the challenged television advertisements in the record. (App. 465.) The films, storyboards and copies of the advertisements were admitted into evidence. (App. 306, 335, 336, 337.) ITT and Bates stipulated that the advertisements set out in the complaint were representative of their nutritional advertising. (App. 494-95.) Both admitted that consuming Wonder Bread would not provide a child with all the nutrients essential to healthy growth and development. They also admitted that Wonder Bread is not an outstanding source of nutrients, distinct from other enriched breads, but is, in fact, only a standardized enriched bread. They further admitted that Wonder Bread is not the optimum contribution that a parent can make to a child's nutrition during the formative years of growth. (App. 40-42; 403-04.)

10/ (Continued from preceding page)

> tender and light, just the way you like it. You can enjoy Wonder so many times during the day: for your sandwiches at lunch, after-school snacks . . . perhaps with your evening meal, too. So, Mom, when your kids tell you how big they want to be--remember, they'll never need Wonder more than right now. Wonder helps build strong bodies 12 ways. (Compl. para. 7(d); CX 172 § 3)

[App. 203-207. Footnotes 5-10, supra, are from the Commission's opinion.]

Two medical doctors testified that Wonder Bread does nothing to enhance growth. Doctor Galston established that growth is a function of the biological character of the cells in the body and is not determined by the consumption of Wonder Bread or any other specific food. (App. 314; 319.) Doctor Granger testified that the instantaneous growth that would be perceived from the advertisements by a very young child is not provided by Wonder Bread, and that even older children, who would not believe that the advertisements depicted instantaneous growth, would be misled into believing that Wonder Bread provided some dramatic growth, when in fact it would not enhance growth in any way, and certainly not more than any other equally enriched bread. (App. 326-27.)

Two nutritionists testified as to the capacity of Wonder Bread, and enriched white bread, to contribute to growth. Doctor Briggs did not believe that the enrichment of bread provided good nutrition because the level of nutrients provided in enriched white bread is small. (App. 361.) Doctor Latham demonstrated that on an equi-caloric basis, the level of nutrients contained in enriched white bread is approximately the same as the level of nutrients contained in a number of other common products, such as cereals, not usually regarded as necessary for growth, and certainly without the capacity to provide extraordinary growth.

(App. 373, 492.) The purpose of enriched white bread, as defined by the government, was, in the opinion of ITT's nutritionist, Dr. Sebrill, to prevent certain diseases caused by the absence of certain vitamins and a mineral in the ordinary diet. (App. 433-35.)

Numerous witnesses testified about how children would perceive the representations made by the challenged advertisements. All were in agreement that very young children (6 and under) would believe that Wonder Bread would provide instantaneous growth (e.g., App. 309, 313 (Dr. Galdston); 323-24, 326 (Dr. Granger); 342-43, 345, 347 (Dr. Solnit); 406, 409 (Dr. Littner)). All agreed that skepticism about instant growth would exist in children after the age of seven, but that children would all view the advertisements as promising some special growth. (E.g., App. 309 (Dr. Galdston); 324, 328, 334 (Dr. Granger); 342-43, 347, 352-354 (Dr. Solnit); 405 (Dr. Littner).) Dr. Granger and Dr. Littner agreed that there would be a resurgence in magical thinking in adolescence, leading to literal belief of the Wonder Bread message. (App. 309, 404.) Magical thinking is also present to some degree in adults. (App. 404.)

The Captain Kangaroo advertisement has an even greater capacity than the growth sequence advertisements for inducing belief by children that Wonder Bread will provide dramatic growth because:

> . . . the major figures that are there to amuse them, to educate them, and to invite them into a pretend world, now become the figures who are the--you will excuse the expression--the hucksters for the product that is being promoted. [App. 348.]

It is difficult for the child to make the distinction. (App. 348-49; see also 333.) Even among parents who are not confident of themselves in the nutritional area, a small but significant percentage, will believe Captain Kangaroo because they feel they can trust him. (App. 351.)

Several surveys were offered into evidence and numerous witnesses were called to testify as to the meaning of the surveys.[10/] Five of the surveys were conducted on behalf of ITT and reviewed by Bates to determine the effectiveness of their advertising for Wonder Bread. The Administrative Law Judge, in findings adopted by the Commission, considered three of them to be of doubtful validity. (App. 99-100, 182.) The Commission also adopted the Administrative Law Judge's findings that the remaining two surveys involved careful methodology and were projectable to larger populations. (App. 97, 99, 182.)

10/ The Commission concluded that these surveys were relevant to what the advertisements represented and rejected the argument of ITT and Bates that the verbatim responses were the only measure of ascertaining the meaning of the advertisements. However, the Commission also examined the verbatim responses, and found that they supported its finding. (App. 210-212.)

The first of these surveys found to be reliable was conducted by the marketing research firm of Grudin, Appel, Haley, Inc. ("G/A/H") and consisted of a series of tests initiated in 1969 to measure the effectiveness of the advertising of Wonder Bread. (App. 363, 364-65, 366.) These test, in addition to measuring consumer ratings of the attributes of Wonder Bread, included the verbatim responses of consumers as to their recollection of the message of the commercial they had just seen. (App. 188.) The tests were designed to elicit the interviewees' recall of the explicit message of the advertisements, not the latent or implied message. (App. 461, 462, 478-480.) To the extent that these tests provide information about the implicit representations made in the advertisements ". . . it is like the tip of an iceberg." (App. 463.)

The second survey found to be reliable was conducted by Batten, Barton, Durstine & Osborn, Inc., and measured consumer perceptions of Wonder Bread in April and July of 1971 (App. 370-71). It was designed, according to Mr. Light, a Vice President of the agency, "for the express purpose of tracking advertising effectiveness." (App. 368.) This study indicated that 6.8% and 5.8% of consumers, respectively, perceived Wonder Bread as the best brand "helping children grow." Similarly 3% in April and 3.3% in July believed that Wonder Bread was one among several brands that are better in helping children grow. Wonder Bread was rated first above

the other six specified brands in each of the seven markets surveyed in this period. Both regular and nonregular users of Wonder Bread conceived it to be best in helping children grow. (App. 483-86.) A smaller percentage, 4.5% and 5%, respectively, saw Wonder Bread as the best brand in nutrition and 4.2% and 3.7% saw it as one among several brands better in nutrition.

b. The participation of Bates

Bates stipulated to its participation in the creation, preparation, and dissemination of the advertising in the "Wonder Years" and "How Big" campaigns. (App. 493-513.) Early in the proceedings complaint counsel indicated that twelve witnesses from Bates would be called to place on the record the extent that Bates participated in creating the challenged advertising and to establish the basis for broad product coverage in the proposed cease and desist order. (App. 288; 292; 339-40.) Counsel for Bates objected to calling any witnesses from Bates. (App. 285-86; 288-91; 293-94; 295-96; 398-99.) Before this Court they actively participated in creating the advertising.

c. The initial decision

The Administrative Law Judge relying solely on his own reading of the advertisements determined that none of the representations alleged by the complaint were, in fact, made and dismissed the complaint in toto stating: ". . . [the] case was based upon a false assumption (to wit, the respondent's advertising said certain things which it did not say either directly or by implication)." (App. 140.)

d. The opinion of the Commission

In its opinion the Commission, after reviewing the entire record adopted some of the findings of fact made by the Administrative Law Judge (App. 182) and made additional findings. (App. 186-198.) After reviewing the history of the proceedings, including the issues raised and the challenged advertising of Wonder Bread (App. 199-207), the Commission established the legal basis for its opinion. As did the Administrative Law Judge, the Commission emphasized that judicial interpretation has sanctioned the use of the Commission's expertise in determining whether advertising is deceptive or misleading, pointing out that only a capacity or tendency to mislead is required to establish a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Commission recognized, however, that it must take into consideration extrinsic evidence if it exists, and could

not limit its review to the advertisements alone. (App. 208.) The Commission reviewed this extrinsic evidence, including two market surveys, the verbatim responses to the G/A/H tests, and the testimony of expert witnesses. (App. 209-10.)

Paragraph 8

Turning to the complaint, the Commission agreed with the contention of ITT and Bates that Paragraph 8(a) must be read to allege that Wonder Bread was represented as an outstanding bread, distinct from "all" other enriched breads, not only "some" other enriched breads as complaint counsel contended. (App. 212-13.) The Commission found the advertisements did not make this very specific representation either expressly or by implication. Similarly, the Commission agreed with the Administrative Law Judge that the very specific representations alleged in Paragraph 8(b)-(e) were not made expressly or by implication. (Id.)

Paragraph 10

The Commission found, as did the Administrative Law Judge, that the advertisements did not expressly make the claim that Wonder Bread is "an extraordinary food for producing dramatic growth." However, the Commission concluded that this was the implicit message of these advertisements. (App. 215.)

The Commission listed the factors in the advertisements which, in addition to the growth sequence, led it to conclude that Wonder Bread was being represented as an extraordinary food for providing dramatic growth. (Id.) Rejecting ITT's argument that the growth sequence did not appear on children's programs, the Commission noted that it did not depend on the growth sequence alone for its determination, and that, in fact, the advertisements were viewed by substantial numbers of children. The Commission also rejected an argument by ITT and Bates that those over six would be skeptical of the growth sequence, holding that skepticism is not a defense to misleading and deceitful advertising. (App. 216.)

The Commission found the evidence supported the conclusion that the advertisements conveyed the message that Wonder Bread was an extraordinary food for producing dramatic growth. (App. 192.) The Commission cited examples of two expert witnesses who supported its view. (App. 216.) The Commission found two surveys to be reliable in methodology and to support its finding, despite the fact that neither was designed to measure implicit messages from the advertising. The Commission independently examined the verbatim responses to the G/A/H survey and found that fifty out of seven hundred supported its assessment of the advertising. (App. 217.)

Based upon the stipulations by ITT and Bates and the testimony of several witnesses, the Commission concluded that Wonder Bread was not extraordinary food for producing dramatic growth. (Id.)[11/]

In considering the unfairness allegation in Pargraph 10 the Commission noted that "it rests almost entirely on the fact that the advertisements make false promises" and that "the consequences of deception . . . are already prohibited by law." (App. 220.) The Commission held, therefore, that it need not find a separate violation based on unfairness from the same acts in this case. (Id.)

Hostess Snack Cakes

The Hostess Snack Cake allegations were dismissed because the Commission determined that the advertisements made a qualified claim, i.e., that Snack Cakes offered more than good taste, they offered good nutrition. With such a limited claim, no housewife would be misled into believing that they did not contain a large amount of sugar, the key to complaint counsel's theory that the representation was false. Finally the Commission determined that the campaign was of short duration and did advertise a technological innovation. (App. 221-22.)

11/ ITT and Bates do not challenge this finding before this Court.

Bates

Applying applicable case law, the Commission rejected the Administrative Law Judge's finding that Bates had not actually participated in the deception. (App. 223-27.) The stipulated facts established the active participation of Bates. (App. 224.) The Commission rejected the claim that Bates had no reason to know that the representations alleged were being made since that is its field of expertise. (App. 225-26.) The Commission held that an advertising agency cannot create claims about a product and then deny responsibility for making them, and that the advertising agency must independently verify facts on which it bases a representation if it does not claim to be misled. (App. 226.)

Order

Discussing the order, the Commission rejected the argument that any cease and desist order should be limited to the product misrepresented since nutritional claims could be abused in the promotion of any food product. The Commission, therefore, prohibited deceptive claims of nutritional value for all food products. It did limit the order, however, to the type of desceptive claims found in the Wonder Bread advertising and to allow truthful representations to be made. (App. 229.)

Reconsideration

ITT and Bates moved for reconsideration before the Commission. (App. 239-262.) On reconsideration the Commission pointed out that the evidence it considered on the capacity of the advertisements to mislead parents would a fortiori have the same capacity to mislead a less sophisticated audience. (App. 273.) In addition, the Commission modified its order by limiting the affirmative disclosure required by ITT and Bates and explained precisely how the challenged paragraphs of the order reasonably related to the offense found. (App. 274-76.)

SUMMARY OF ARGUMENT

The Commission, in this proceeding, found that the advertisements created and disseminated by ITT and Bates from 1964 through 1971 had the capacity to mislead children into believing that Wonder Bread was an extraordinary food for producing dramatic growth in children. The complaint alleged that these claims were both false and unfair. The Commission found these advertisements to be false and did not reach the question of whether they were also unfair. The law is clear that in such circumstances the Commission, having found one violation of the law, need not find another. Nor is a party before the Commission deprived of due process by the fact that only one violation is found where two are

alleged. The finding that these advertisements were false is based upon the Commission's examination of the advertisements and was considered in light of the evidence and thus is based upon substantial evidence. The Administrative Law Judge dismissed the complaint on the ground that the advertisements did not, in his view, make the challenged representations. The Commission did not improperly disregard his decision. Because the Administrative Law Judge was merely relying on his expertise in determining that the advertisements did not make the claimed representation, the Commission did not err in using its expertise to reach a contrary conclusion. The evidence supports the Commission's finding that children were deceived by the advertisements and shows, in addition, that some adults were also deceived.

The order, in part, requires ITT and Bates to substantiate certain nutritional claims, make affirmative disclosure about other nutritional claims and cease from using misleading demonstrations. To limit the order to the product found to be in violation of the law would negate the purpose of the proceedings in view of ITT's claim that it does not intend to use a nutritional theme for that product in the future. The order, prohibiting the type of misrepresentation found, is reasonably related to the violation and is as clear as the circumstances of this case permit. The Commission did not

err in considering other consent orders agreed to by Bates, and even if it did, this error is harmless since there were numerous other factors in the record on which to justify a broad order. Finally, there is no legal requirement for a "known or should have known" clause in the order as Bates contends and the failure to include it is not arbitrary.

ARGUMENT

I. The finding of the Commission that ITT and Bates have engaged in deceptive advertising in violation of Sections 5 and 12 of the Federal Trade Commission Act is supported by substantial evidence and rests upon issues fairly tried.

A. The Commission need not find an advertisement both false and unfair to violate the Federal Trade Commission Act

Both ITT and Bates argue that they were deprived of notice and an opportunity to be heard on the violation found. (Brief of ITT at 15-22, Brief of Bates at 5-9) This argument is based upon the unsupported contention that they never knew that Paragraph 10 alleged the falsity of the claim that Wonder Bread was an extraordinary food for producing dramatic growth in children was an issue in and of itself. They also seek to convince this Court that the Commission found that the advertisements were misleading to the public as a whole and not just children.

Insofar as is relevant here, Paragraph 10 of the complaint presented two separate issues on the merits: (1) whether

the "Wonder Years" and "How Big" advertisements falsely represented Wonder Bread as an extraordinary food for producing dramatic growth, and (2) whether that representation, if made, was also unfair to children. (App. 30-31; 50-51; 53; 64; 281-82; 284; 294; 296.) Both issues were fully litigated.[12/]

Complaint counsel stated that he would rely primarily on the expertise of the Administrative Law Judge and the Commission to determine if the representations were made. (App. 301.) The Administrative Law Judge found that the representations alleged were not made and dismissed the entire complaint. (App. 139-40.) On appeal to the Commission, complaint counsel again argued that the false representation charged in Paragraph 10 was separate from the unfairness issue. (App. 145-55.) In argument before the Commission complaint counsel admitted that the unfairness charge was surplusage in Paragraph 10. (App. 468-69.) Neither ITT nor Bates challenged this point before the Commission.

12/ Before the hearing began, complaint counsel, ITT, and Bates agreed on the issues to be litigated. (App. 283.) An affidavit filed by counsel for ITT for the purpose of recording the agreed issues under Paragraph 8 (App. 173-78) also demonstrates that ITT and Bates were aware that the false representation alleged in Paragraph 10 was separate and distinct from the unfairness issue. (App. 176, 178.)

During the trial, complaint counsel presented expert witnesses to testify that children were misled by the advertisements and to testify how being misled exploited them. Even the experts presented by ITT and Bates conceded that children would be misled by the advertisements as alleged, but contended that they would not suffer much harm, and therefore, were not exploited by the falsity.[13/] In their brief before the Commission ITT and Bates contended that the advertisements were not false "to any relevant audience" and, even assuming that they were false, they did not exploit children. (App. 165-168.)

The conclusion is inescapable from a reading of the record that the falsity of the advertising was an issue separate and apart from any unfairness claim. The law is well settled that where the Commission's complaint is grounded upon two theories of liability, as it was here, and it can be sustained on the basis of one, the order imposed should not be disturbed because the Commission applied only one of the theories and not both. Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374, 391 (1965); Stanley Works v. Federal Trade Commission, 469 F.2d 498, 503 (2d Cir. 1972), cert. denied, 412 U.S. 928 (1973); Kroger Co. v. Federal Trade

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13/ Even now ITT and Bates concede that "paragraph 10 charged 'exploitation of children' by means of false advertising to children." (Brief of ITT at 17.) (Emphasis added.)

Commission, 472 F.2d 882 (9th Cir. 1972), cert. denied, 412 U.S. 918 (1973); Federated Nationwide Wholesalers Service v. Federal Trade Commission, 385 F.2d 253 (2d Cir. 1968); Country Tweeds, Inc. v. Federal Trade Commission, 326 F.2d 144 (2d Cir. 1964).

In Leon A. Tashof v. Federal Trade Commission, 437 F.2d 707 (D.C. Cir. 1970), the Court of Appeals reached the same conclusion, despite the fact that the complaint there was much less clear than that in the instant case. The Court observed that "although the complaint is hardly a model of clarity, we think that a fair reading provides sufficient notice." (Footnote omitted.) (Id., 437 F.2d at 713.)[14/]

The main cases ITT and Bates cite for their lack of notice argument, Rodale Press, Inc. v. Federal Trade Commission and Bendix Corp. v. Federal Trade Commission, are clearly inapposite in this case. In both cases the Commission decided the

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14/ If the Court agrees with the contention of ITT and Bates, that the case was decided on a theory which was not tried, the proper remedy would be remand to the Commission for further consideration of the unfairness allegation in Paragraph 10. The Commission dismissed this charge out of an abundance of fairness to ITT and Bates, because in its view the only exploitation was dependent on the falsity of the advertisements. It is difficult to discern how ITT and Bates were harmed by the dismissal of this section of the paragraph. Because there is no law supporting their contention, they cite no authority for the conclusion that the charges must dismissed absent a finding of exploitation. As is clear from the discussion, infra, the law is to the contrary.

case on a theory never alleged, argued, or even heard of by the parties before the Commission's decision. That is not the case here.[15/]

The second argument of ITT and Bates is that the Commission created a new charge by considering the effect of the advertisements on adults as well as children in finding the charge under Paragraph 10 was sustained. To make this argument they urge that this Court ignore the opinion of the Commission on reconsideration which clearly explained that the deception of adults was considered as a factor in determining whether the advertisements deceived children. Courts have held that the power to reconsider is inherent in the power to decide. Spanish International Broadcasting Co. v. Federal Communications Commission, 385 F.2d 615 (D.C. Cir. 1967). In Braniff Airways, Inc. v. Civil Aeronautics Board, 379 F.2d 453, 465-67 (D.C. Cir. 1967), the Court held

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15/ A charge may be sustained even if there is a variance between the allegations and the finding, National Labor Relations Board v. Fant Milling Co., 360 U.S. 301, 308-09 (1959); Morgan v. U.S., 304 U.S. 1, 18 (1938); Swift & Co. v. U.S., 393 F.2d 247, 252 (7th Cir. 1968); J.B. Williams v. Federal Trade Commission, 381 F.2d 884, 888 (6th Cir. 1967); Armand Co. v. Federal Trade Commission, 84 F.2d 923 (2d Cir. 1936), cert. denied, 299 U.S. 597, as long as the party had a reasonable opportunity to know and to meet the issues. To determine this the Court can look to the briefs and argument of the parties. Swift & Co. v. U.S., supra; Benrus Watch Co. v. Federal Trade Commission, 352 F.2d 313, 323 (8th Cir. 1965), cert. denied, 384 U.S. 939 (1966).

in sentences preceeding the comment on "repair carpeting" that ITT quotes (Brief of ITT at 19) that the opinion on reconsideration is part of the agency's final decision, because "[r]econsideration is the obvious opportunity available to an agency to cope with defects appearing on its first consideration. Indeed a court may not ordinarily consider errors that petitioner had failed to bring to the agency's attention."[16/] A like result was reached in Greater Boston Television Corp. v. Federal Communications Commission, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923, rehearing denied, 406 U.S. 943, where the Court considered the opinion on reconsideration as part of the agency's decision.

The Commission's opinion on reconsideration, which this Court should consider as part of the Commission's decision making process, makes clear that the Commission only considered the Paragraph 10 allegation as a deception of

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16/ In any event, the quote used by ITT has no application to this case, The Commission here was clearly addressing a defect alleged by ITT (App. 240) and was not adding another ground for its decision. Furthermore, what the Court rejected as "repair carpentry" was an attempt by the agency to justify its majority opinion based upon later statements of some of its members in an opinion denying reconsideration which relied heavily on an earlier minority opinion and advanced new reasons for the decision not "averted to in the Board's decision, [and] manifestly . . . not having the status of findings supported by the expertise of the . . . [agency]." Id. 379 F.2d at 467. Here the full Commission clarified and restated its earlier finding in response to the alleged defect. No new grounds were advanced for the decision and it clearly did have the status of findings supported by the Commission's expertise.

children and looked to the evidence of how adults considered the advertisements as indicating that if a more sophisticated group (adults) could be misled by the advertisements, they would of necessity mislead children who are less sophisticated. (App. 273.)[17/] ITT and Bates only seek to ignore this, not to controvert it.

Aware of the teaching in Cinderella Career & Finishing Schools, Inc. v. Federal Trade Commission, 425 F.2d 583 (1970), the Commission considered not only the advertisements but the

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17/ ITT cites this sentence for the proposition that the Commission conceded, when this case was previously briefed, that the order could not be supported if it was based on an adjudication that the paragraph 10 misrepresentation was made to adults. (Brief of ITT at 18 and 19 and notes 16 and 17.) The point to be resolved there, as it is here, is not whether adults were also deceived , but whether by considering the evidence that demonstrated the deception of adults as a fortiori supportive of the finding of deception of children, the Commission improperly changed the nature of the case. The Commission did not. In essence, ITT's argument seems to be that an agency must ignore evidence of record even though it is relevant to an issue, if counsel did not specifically direct the evidence to that issue. This has not previously been the law, which requires the Commission to consider the entire record. Despite the contention of ITT, the Commission discussion of corrective advertising was made in light of the fact that it was heavily litigated below (and formed the sole basis of the appeal by Consumers Federation of America, et al., which caused the transfer of this case). The Commission found no evidence of continuing misperception by children which would necessitate such a remedy and the evidence of consumer's continuing misperception to be inconclusive and hence did not order it.

other evidence of record to the extent it was relevant to the capacity of the advertisements to deceive children.[18/] Adherence to this procedure was not a denial of due process.

Nor was the consideration of this evidence relating to the deception of adults the basic premise on which the Commission found the advertising deceptive to children, as ITT and Bates would have this Court believe. (Brief of ITT at 18.) As has already been demonstrated, it is only a factor that the Commission considered, along with other record evidence such as the testimony of psychiatrists as confirming its conclusion that the advertising in question had the capacity to mislead children.[19/]

18/ The suggestion of ITT and Bates that they would have adduced additional evidence on how adults perceived the advertisements and how the surveys should be analyzed if they had known the Commission was going to consider the perception of adults is only an attempt to overcome their trial tactics. They argued that the advertisements would not make the representation alleged in Paragraph 10 to anyone. (App. 168.) They invited the Commission, to examine the G/A/H verbatim responses to see how consumers in general perceived the advertisements. (App. 164.) They urged that the G/A/H verbatim responses, not the testimony of experts, were the best evidence of how consumers perceived the advertisements. (App. 475.) There was already evidence from the witnesses presented by complaint counsel, confirmed by their witnesses, that children were in fact misled by the advertisements.

19/ The necessity for an order covering advertising seen by adults as well as children is not premised on a finding of deception of adults but on the Commission's correct finding that such advertising was seen by and deceived substantial numbers of children. If this order is to protect this less sophisticated group who, as the record demonstrates, are viewing the deception in large numbers, its terms cannot be limited to a specific group.

The argument ITT and Bates advance that the Commission must find advertising both false and unfair is totally without legal merit. Similarly their argument that the Commission improperly changed its theory is lacking in both factual and legal support.

B. The findings of the Commission are supported by substantial evidence

The Commission here found, based upon its own review of the advertisements, that the challenged advertisements contained the representation alleged in Paragraph 10. It concluded from the uncontested facts that the representation was false.[20/] The law is clear that "It is the function of the Commission to determine '[t]he meaning of the advertisements or other representations to the public, and their tendency or capacity to mislead or deceive . . . .'" Doherty, Clifford, Steers & Shenfield, Inc. v. Federal Trade Commission, 392 F.2d 921, 925 (6th Cir. 1968), quoting Carter Products, Inc. v. Federal Trade Commission, 323 F.2d 523, 528 (5th Cir. 1963).[21/] The best evidence of the meaning of a representation is the advertisement itself. Bakers Franchise Corp. v. Federal Trade Commission, 302 F.2d 258, 261 (3d Cir. 1962). If

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20/ ITT and Bates do not contest here, and never have, that if the representation was made, it is false.

21/ See also, National Bakers Services, Inc. v. Federal Trade Commission, 329 F.2d 365, 367 (7th Cir. 1964); P. Lorillard Co. v. Federal Trade Commission, 186 F.2d 52, 58 (4th Cir. 1950).

the Commission finds a representation resting on an inference which "reasonably [can] be drawn from the commercials themselves, the Commission's findings should be sustained." Federal Trade Commission v. Colgate-Palmolive Co., supra, 380 U.S. at 386.

Other courts, in addition to the Supreme Court, have held that "the Commission may draw its own inferences from the advertisement and need not depend on testimony or exhibits (aside from the advertisements themselves) introduced into the record." Carter Products, Inc. v. Federal Trade Commission, supra, 323 F.2d 528. Neither is the "Commission . . . bound to the literal meaning of the words, nor must the Commission take a random sample to determine the meaning and impact of the advertisements." J.B. Williams Co. v. Federal Trade Commission, supra, 381 F.2d at 890; accord, E.F. Drew & Co. v. Federal Trade Commission, 352 U.S. 969 (1957). Even where there is testimony that some of the recipients of the statements are not misled, the Commission can still properly conclude that others will be. Double Eagle Lubricants, Inc. v. Federal Trade Commission, supra. The only stricture on this broad power of the Commission is that it must consider the entire record. Cinderella Career & Finishing Schools, Inc. v. Federal Trade Commission, supra.

ITT and Bates do not, and indeed cannot, point to any evidence to show that what the Commission found (that the advertisements have a capacity to deceive children by representing that Wonder Bread is an extraordinary food for producing dramatic growth in children) is not a reasonable inference. Their entire argument should be rejected on this basis alone.[22/]

ITT and Bates advance an argument that it is inconsistent to find that Wonder Bread was not misrepresented as a bread but was misrepresented as a food. This distinction ignores the context in which this case was litigated. The Commission was confronted with two charges, one of which alleged the advertisements represented Wonder Bread as being an "extraordinary food for producing dramatic growth in children," and the other which alleges that Wonder Bread was superior to all other bread. There is nothing inconsistent or illogical in the Commission's conclusion that the advertisements did not make the representation that Wonder Bread is better than all other enriched

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22/ Even if they could point to such evidence, the law has long been clear that the weight to be given to facts stipulated or proven and the inferences to be drawn from them is for the Commission to determine. E.g., Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726 (1945); Federal Trade Commission v. Pacific Paper Assn., 273 U.S. 52 (1927); Giant Food Inc. v. Federal Trade Commission, 322 F.2d 977 (1963), cert. dismissed, 376 U.S. 967 (1964). U.S. v. J.B. Williams Co., 498 F.2d 414, 429-43 (2d Cir. 1974), is distinguisable, for that case involved an action for civil penalties brought under, 15 U.S.C. § 45(d), in the district court, and not judicial review of the Commission factual finding.

breads but that the advertisements did represent Wonder Bread as an extraordinary food. A product clearly can be misrepresented as an extraordinary food without necessarily being better than all other products in the same category.[23/]

The "food-bread" argument has another fatal defect. Ignoring both the complaint and the Commission's findings, ITT and Bates erroneously portray the representations alleged in Paragraphs 8 and 10 of the complaint as being made to the same individuals. The two paragraphs of the complaint dealt with different misrepresentations made to separate groups--adults and children. The Commission's finding that misrepresentations were made to children in Paragraph 10 cannot be the basis for arguing that the Commission was inconsistent in finding that other misrepresentations were not made to adults in Paragraph 8.[24/]

23/ The plain meaning of extraordinary is that something is better than what is regular or usual and is a relative comparison. The plain meaning of unique, on the other hand, is that the thing to which it is attributed is better than all others and is, therefore, an absolute comparison. ITT and Bates advanced this argument before the Commission.

24/ The Commission did consider the perceptions of adult viewers as confirming the finding that the advertisements had the capacity to mislead children, properly concluding that if a more sophisticated group of individuals was misled a fortori a less sophisticated group would also be misled.

They next attempt to create an inconsistency between the Commission's finding that Wonder Bread was misrepresented as an extraordinary food for producing dramatic growth, but not as a "necessary food." (Brief of ITT at 23.) The distinction is perfectly reasonable however, in view of the representations made in the advertisements. While there were some claims made that implied that Wonder Bread was necessary for growth, this was not the main thrust of the campaigns. The central theme of the advertisements was that eating Wonder Bread would somehow provide dramatic growth which other foods could not provide. Common sense also indicates that the distinction is rational, since many things are thought to be extraordinary without being necessary. For example, driving a Jaguar is an extraordinary mode of transportation to most of us, but is hardly a necessary one.

ITT's citation (brief at 24) to Benrus Watch Co. v. Federal Trade Commission, 352 F.2d 313, 317 (9th Cir. 1965), cert. denied, 384 U.S. 939 (1968), is instructive as to whether the distinction the Commission drew here is arbitrary. In Benrus the court indeed said that the Commission could not make arbitrary distinctions. It went on to hold that the Commission had not acted arbitrarily in finding that advertising by Benrus which represented their watches to be "shockproof" and "shock protected" was misleading because watches can only be made "shock resistant" or "shock absorbing." (Id., 352 F.2d at 322.) The court

also upheld a finding of the Commission that Benrus misled the public by not labeling their watch cases as being made out of base metal, as required by a Commission regulation, where they were coated with gold to the depth of .00083 of an inch and .0007 of an inch. (Id. at 323.) These are finer distinctions than made by the Commission in this case and they were not found to be arbitrary.

Realizing that the Commission's findings are inferences reasonably based upon the advertisements themselves, ITT and Bates make but a brief attempt to argue to the contrary. (Brief of ITT at 24-25.) To do so they seek to have this Court ignore the Commission's finding, that it considered the advertising in their entirety, and conclude that only the growth sequence was relied upon, which they contend is such obvious fantasy it would not mislead anyone. The very case they rely upon, Federal Trade Commission v. Sterling Drug, Inc., 317 F.2d 669 (2d Cir. 1963), defeats their attempt to dissect the advertisements. This Court pointed out that the purpose of the Federal Trade Commission Act is to protect the public and in considering the representations made by advertisements the "cardinal factor is the probable effect which the advertiser's handiwork will have upon the eye and mind of the reader. It is therefore necessary in these cases to consider the advertisement in its entirety

and not to engage in disputatious dissection." (Id., 317 F.2d at 674.) Accord, Charles of the Ritz Distributing Corp. v. Federal Trade Commission, 143 F.2d 676, 679 (2d Cir. 1944). The growth sequence was not the only factor considered. The advertisements were filled with key words, set forth by the Commission in its opinion, that implied that Wonder Bread was an extraordinary food for providing dramatic growth, the kind provided in the sequence. The Commission found that advertisements without the growth sequence had equally as great a capacity to deceive (App. 192). See, supra, pp. 13-14. "Obvious fantasy" may not be objectionable, but the case of ITT and Bates cite for this proposition (Brief of ITT at 25) goes on to say:

> . . . provided there is no underlying misrepresentation. But respondents' difficulty is that they do not come under any such principle. They went far beyond generalities and eye-catching devices . . . . [Carter Products, Inc. v. Federal Trade Commission, supra, 323 F.2d at 529 n. 11, quoting Colgate-Palmolive Co. v. Federal Trade Commission, 310 F.2d 89, 92 (1st Cir. 1962).

The language has equal applicability to ITT and Bates in this matter. The audio portion of the advertisements continually referred to the extraordinary value of Wonder Bread for providing growth. The growth sequence implied that this growth would be dramatic.[25/]

25/ Nor was the growth sequence "obvious fantasy." A real child was depicted as passing quickly through various stages of development in a short time span. While this is fantasy, it was not obvious to all consumers. (See G/A/H verbatim responses; App. 216.)

Because the Commission's decision clearly was based upon reasonable inferences drawn from the advertisements themselves, ITT and Bates are relegated to attacking the evidence the Commission considered in accordance with Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, supra. Even this effort avails them nothing.

Ignoring the testimony of several of the witnesses which confirmed the Commission's opinion that the advertisements would in fact mislead children, ITT and Bates argue that the Commission inferred too much from the witnesses who also conceded that advertisements would be seen by children as promising them dramatic growth. (Brief of ITT at 26.) As has already been pointed out, it is for the Commission to draw inferences from the record, supra, p.34, n. 22. They also argue that because the Commission found that some children might be skeptical of the representations made, they did not violate the law. Long ago this Court held that "there is no merit [in the] . . . argument that, since no straight-thinking person could believe [the claim made], . . . there could be no deception . . . . The law was not 'made for the protection of experts, but for the public -- that vast multitude which includes the ignorant, the unthinking and the credulous.'"[26/] Charles of the Ritz Distributing Corp. v. Federal Trade Commission, supra, 143 F.2d at 679.

26/ It also includes children.

ITT and Bates next turn to the survey evidence the Commission considered and found not to be inconsistent with its conclusion and object because they feel the Commission drew the wrong inference from this data. (Brief of ITT at 27.) We have already demonstrated the lack of merit to this contention, supra, at p. 34.[27/] ITT and Bates then attack the consideration of the "verbatim responses" by the Commission. (Brief of ITT at 28-29.) They, of course, urged that the Commission consider these responses as the best evidence of what the advertisements meant.[28/] They suggest that six percent of the adults viewing the advertisments were misled is not a sufficient percentage on which to base a finding of misrepresentation. (Id. at 27.) The Commission found that the misrepresentation was made to children, and if six percent of the adults viewing the representations were also misled it is obvious that less sophisticated viewers, children, would be misled in even greater numbers. Furthermore, the Commission found, based on testimony, that to the extent that any implicit meaning was found by consumers in tests

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27/ Most of the assertions of ITT and Bates are grounded on the fact that other inferences and conclusions could be drawn from the evidence. Such facts will not justify reversal. Braniff Airways, Inc. v. Civil Aeronautics Board, supra, 379 F.2d at 463; National Dairy Products, Inc. v. Federal Trade Commission, 412 F.2d 605, 620 (7th Cir. 1969), and cases cited therein.

28/ The reason the Commission chose "only 709" responses (Brief of ITT at 27) is obvious. Those were the responses from the advertising in issue. (App. 217.) The rest of the 1,300 responses related to other advertising of Wonder Bread not under consideration here, for example, advertising stressing a "freshness" theme.

designed to measure explicit messages, it would be like the tip of an iceberg. (App. 189.) In any event, six percent of the adult public is a significant number, encompassing several million adult viewers, on which to find that there is a "likelihood or fair probability that the reader [or viewer in this case] will be misled." This is especially true in this case because the deception of adults was considered as indicative of the likelihood that less sophisticated children will be mislead. Federal Trade Commission v. Sterling Drug, Inc., supra, 317 F.2d at 674.

ITT and Bates suggest that the Commission's analysis of the "verbatims" was not expert enough to withstand judicial scrutiny. (Brief of ITT at 29-30.) Yet they not only suggested that the verbatims must be examined, but that "anyone including . . . the Commissioners," could examine the responses to determine what representations the advertisements were making.

The Commission, in its analysis, noted that virtually all of the "verbatims" indicated that consumers were perceiving the message of the advertisements as indication that Wonder Bread provided growth. Six percent of the consumers believed that the advertisements were conveying the message that Wonder Bread was "an extraordinary food for producing dramatic growth in children." The Commission provided two

examples of the type of responses it included in the six percent. The first indicated that a consumer was getting the message that children would grow suddenly. The other indicated skepticism that growth would be as fast as it was portrayed. But both clearly demonstrate that the message of Wonder Bread providing dramatic growth was certainly being conveyed to consumers.[29/]

Quoting from the opinion of the Commission, In re Pfizer, Inc., 81 F.T.C. 23, 65 (1972), ITT and Bates reiterate their argument that six percent is too small a segment of the public to support a finding of deception to consumers.[30/] (Brief of ITT at 31.) Their reliance on this opinion is misplaced. The Commission pointed out that:

29/ The suggestion that the Commission must identify each of the responses it found supportive of its conclusion is clearly without merit. (Brief of ITT at 29.) The Commission's conclusion that the advertisements were potentially deceptive to children, was not premised upon a finding that any percentage of adults were misled, but the fact that a large number of adults apparently were, is indicative that less sophisticated children would be misled. Furthermore, since the Commission presented examples of both extremes (literal belief and some skepticism) this Court can determine if the inference drawn is reasonable. Clearly it is. That some expressed skepticism that growth would be as fast as ITT and Bates represented it does not destroy the fact that they were misled into believing that Wonder Bread was being misrepresented as providing dramatic growth.

30/ Like their lack-of-notice argument this proceeds on the erroneous assumption that the Commission made such a finding of deception to consumers the primary basis for its order. See, supra, pp. 30-31. In the next paragraph they concede they know the true nature of the Commission's findings here, since they question "the Commission's conclusion that Wonder's advertising was unlawful because it represented to children that the product was an extraordinary food for producing dramatic growth." (Emphasis in original) (Brief of ITT at 31.)

> A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and and unrepresentative segment of the class of persons to whom the representation is directed. [In re Pfizer, Inc., supra, at p. 65.]

Six percent of the adults who viewed the ads is not, as we have demonstrated, an insignificant number of the public, since this finding was reached based upon a survey that ITT paid for and relied on. Further, the Commission found that the survey was not designed to elicit implicit representations, and to the extent it revealed them the figure is probably a gross underestimation of the percentage of adults deceived. Finally, and most importantly, the Commission found these advertisements directed to children, and there was unrebutted testimony that large numbers of children were deceived, which, in combination with the fact that a significant number of more sophisticated viewers were deceived, indicates that large numbers of children were in fact deceived.

Finally, ITT and Bates argue that the Commission's finding that the advertisements have the capacity to deceive children is erroneous because children were only accidental viewers of the advertisements. (Brief of ITT at 32-33.) This argument is clearly without merit, proceeding as it does on a misstatement of the facts. The key misstatement is that children only accidentally viewed the growth sequence, which ITT and Bates further misrepresent to be the only segment of the advertisements to be misleading. The Commission found, in supplemental finding 16, that:

> Various healthy children between the ages of one and twelve perceived the "How Big" and "Wonder Years" campaign advertisements and the Captain Kangaroo and Bozo Circus advertisements as promising some special growth capacity which would not be available without eating Wonder Bread. [Solnit 609, 618, 622, 623, 638-640; Granger, 509, 516, 528, 549, Littner 2305.)

There is ample record evidence for this finding. Contrary to the assertion of ITT and Bates (Brief of ITT at 32), the advertisements directed specifically at children on the Captain Kangaroo and Bozo Circus programs had a greater capacity to mislead children into believing that Wonder Bread promised an extraordinary growth capacity because the commercials were delivered by figures whom children trusted. An ITT official testified that the same advertisements that comprised the "Wonder Years" and "How Big" campaigns were also shown on children's programs. (App. 390-92.)[31/] Furthermore, ITT and Bates stipulated that substantial numbers of children viewed these advertisements.[32/] Clearly children were not just accidental viewers.

31/ The Commission found otherwise. (App. 215.)

32/ ITT now characterizes children as only "some" of the viewers. (Brief of ITT at 5.) The lack of exactness in the record as to the numbers and ages of children that viewed the advertisements directed at this target group can only be described as self-induced deficiency. ITT and Bates stipulated that "a substantial number of children" viewed the advertisements on the condition that the complaint counsel not call witnesses from the A. C. Nielson Company to give a demographic breakdown of the viewing audience. (App. 516-17.) An indication of how large this audience of children was, and how imprecise the targeting on adults was, can be discerned from the testimony of a Bates executive. He stated that in 1969 the advertisements directed at women 18

(Continued on following page)

The suggestion that the Commission's finding would make it impossible for advertisers to work their trade (Brief of ITT at 33) has been considered and answered by the Supreme Court. In Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. at 390-91, it said:

> Respondents claim that it will be impractical to inform the viewing public that it is not seeing an actual test, experiment or demonstration, but we think it inconceivable that the ingenious advertising world will be unable, if it so desires, to conform to the Commission's insistence that the public not be misinformed. If, however, it becomes impossible or impractical to show simulated demonstrations on television in a truthful manner, this indicates that television is not a medium that lends itself to this type of commercial, not that the commercial must survive at all costs.

This rationale applies here. If ITT and Bates' deceptive nutritional claims are broadcast at a time when a substantial number of children are likely to be viewers the proper solution is that these deceptive claims should not be made, not that children should continue to be deceived.

32/ (Continued from preceding page)

through 49 with children under 18 "hit" only twenty-eight percent of this group in the total audience. At the same time children ages 2 through 11 comprised twenty-four percent of the audience that was also "hit." (App. 445-46.) However, if magazine advertisements were excluded from the calculation, Wonder Bread advertisements "hit" an audience comprised of twenty-six percent women 18 through 49 and twenty-six percent children 2 through 11. (App. 458.)

C. The Commission did not disregard the Initial Decision or the evidence of record in finding the deception of children

ITT and Bates attempt to fashion an argument around the decision of the Court in Cinderella Career & Finishing Schools, Inc. v. Federal Trade Commission, supra, that is wholly without merit. (Brief of ITT at 33-37.) In Cinderella, the Hearing Examiner considered the testimony of witnesses that they were not misled by the advertising and concluded that the misrepresentations alleged in the complaint were not made. The Commission, on appeal, stated that it would make its own review of the advertisements and need not consider the evidence of record. In doing so the Commission reached the conclusion that the advertising was misleading, without a single citation to the other evidence of record or any discussion of why it disagreed with the Hearing Examiner. It was the Commission's refusal even to consider the testimony of witnesses who had seen the advertisements that required reversal.

The decision obviously did not intend to hold that the Commission could never reverse the findings of the Administrative Law Judge. All that is required is that the Commission "consider [the initial] decision and the evidence in the record upon which it is based . . . ." (Id., 425 F.2d at 588.) In a subsequent decision the same Court sustained the Commission's reversal of the finding of a Hearing Examiner stating:

> Since the Hearing Examiner's dismissal of the charge did not rest on his determination of the credibility of witnesses, nothing prevented the Commission from inspecting the evidence and drawing its own conclusions. See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). [Tashof v. Federal Trade Commission, supra, 437 F.2d at 711 n. 18.]33/

The Administrative Law Judge in this case made no findings based upon credibility of witnesses in determining that the advertisements did not make the challenged representation. He made this determination based solely on his own review of the advertisements which the Commission is as competent to evaluate as was the Administrative Law Judge. (App. 139-40.)34/ For this reason alone, in light of the opinion in Tashof, supra, the Commission's determination that the advertisements were misleading should be sustained.

The Commission, however, went beyond simply a de novo review of the advertisements and considered the other evidence of record in light of its opinion that the advertisements had the capacity and tendency to mislead children. Indeed, the Commission considered exactly the type of testimony from experts in children's perceptions suggested by the Court in

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33/ Other courts have reached the same conclusion. See, e.g., Alterman Foods, Inc. v. Federal Trade Commission, 497 F.2d 993 (5th Cir. 1974); OKC Corp. v. Federal Trade Commission, 455 F.2d 1159 (10th Cir. 1972); Seeburg Corp. v. Federal Trade Commission, 425 F.2d 124, 127 (6th Cir. 1970).

34/ His findings 146-59 on Paragraph 10 in the Initial Decision were concerned with the extent to which children would suffer from the deception that he found the result of the advertising and its consequent unfairness. (App. 109-112.)

Cinderella, supra, 425 F.2d at 586. This testimony supported its view that the advertising did make the representation alleged and that the representation was false.[35/] The Commission also considered the reliable surveys conducted for ITT and Bates, and found that even though they were designed to test the explicit messages conveyed to adults these surveys in fact demonstrated that more sophisticated adults were receiving the same misperceptions as those received by children. Furthermore, the Commission considered the best evidence of adults' perceptions, the "verbatims," and conducted an analysis of them to see how adults perceived the advertisements. Unlike the Administrative Law Judge who stated that none of the challenged representations were made, the Commission set forth the reasons that the representation was made from its examination of the advertisements, why it was found false (which is uncontested here), and how the other evidence of record confirmed this finding.

The only other area in which there was serious disagreement between the Administrative Law Judge and the Commission was on the issue of the liability of Bates. Again no issue of credibility was involved and the Commission was free to draw

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35/ Even the witness presented by ITT and Bates admitted that children would misperceive these advertisements as representing that Wonder Bread was an extraordinary food for producing dramatic growth. (App. 404, 406, 409.)

its own conclusions from the stipulated facts.[36/] Tashof v. Federal Trade Commission, supra. The Commission however did more; it set forth at length the reasons for it reaching the conclusion that it did and analyzed its reasons in terms of applicable legal precendents, stating that the reason for its disagreement with the Administrative Law Judge was that he erred in the legal standard he applied. This is exactly what Cinderella, supra, requires.

II. The Order Issued by the Federal Trade Commission To Cease and Desist Is Reasonably Related to the Violation Found

A. The Commission need not limit the cease and desist order issued to the specific violation found

Numerous courts have considered the scope of Commission orders, and

> [i]t has been repeatedly held that the Commission has wide discretion in detetermining the type of order that is necessary to cope with the unfair practices found, e.g., Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608, 611, and that Congress has placed the primary responsibility for fashioning orders upon the Commission, Federal Trade Commission v. National Lead Co., 352 U.S. 419, 429. For these reasons the courts should not "lightly modify" the Commission's orders. Federal Trade Commission v. Cement Institute, 333 U.S. 683, 726. [Federal Trade Commission v. Colgate-Palmolive Co., supra, 380 U.S. at 392.]

36/ Neither ITT nor Bates challenge this finding.

The standard by which the orders of the Commission are to be measured is that "courts will not interfere [with Commission orders] except where the remedy selected has no reasonable relation to the unlawful practices found to exist." Federal Trade Commission v. National Lead Co., 352 U.S. 419, 428 (1957).

Part of the reason for this extremely broad authority is that:

> Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. [Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 473 (1952).]

One court of appeals has held that: "Once the Government has borne its burden of establishing violations of the law, all doubts about the remedy are resolved in its favor." Adolph Coors Company v. Federal Trade Commission, 497 F.2d 1178, 1189 (10th Cir. 1974), cert. denied, 419 U.S. 1105 (1975), citing U.S. v. E. I. du Pont de Nemours & Co., 366 U.S. 316 (1961). For, as the Supreme Court has pointed out "Those caught violating the Act must expect some fencing in." Federal Trade Commission v. National Lead Co., supra, 352 U.S. at 431. In each case the propriety of a broad order depends upon the "specific

circumstances of the case." Federal Trade Commission v. Colgate-Palmolive Co., supra 380 U.S. at 394.

ITT and Bates, "having lost the battle on the facts, . . . hope to win the war on the type of decree. They fight for the right to continue to use [for other products] . . . the very same weapon with which they carried on their unlawful enterprise." Federal Trade Commission v. National Lead Co., supra, 352 U.S. at 429-30. To do so they seek to limit the Commission's order, prohibiting the type of violations found to have been made, to a single product, Wonder Bread. (Brief of ITT at 42; Brief of Bates at 13.) Despite having been found in violation of the law they will be free to resume the same type of misleading advertising found here for other food products, knowing full well no "fencing in" will be required until they are again found in violation of the law, and not subjected to any penalty until still a third violation is found. It is exactly this type of ineffective proceedings the 1959 amendment to the Clayton Act, referred to by the Supreme Court in Federal Trade Commission v. Henry Broch & Co., 368 U.S. 360, 367-78 (1962), was designed to prevent.[37/]

37/ This 1959 amendment to the Clayton Act provided for enforcement of the Act under the provisions similar to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Federal Trade Commission Act was earlier amended in 1938 to prevent such ineffective proceedings.

(Continued on following page)

ITT first objects that the order is unreasonable because it prohibits false advertising to all audiences, not just advertising intended for children. (Brief of ITT at 38.) The record clearly supports the need for the order to apply to all advertising. During the period in question the challenged advertisements in the "Wonder Years" and "How Big" campaigns were shown indiscriminately to children and adults in the general audience and were used, as well, on children's programs. ITT and Bates stipulated that when shown to general audiences the advertising was seen by substantial numbers of

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37/ (Continued from preceding page)

Since both ITT and Bates place primary reliance on Broch, supra, for their argument that the Commission's order is too broad, it seems particularly relevant that the Supreme Court used the language they quote (Brief of ITT at 42; Bates at 35) precisely because the amendment eliminated the necessity of proving three violations of the law before penalties could be imposed. Yet by limiting the order here to Wonder Bread they seek approval from this Court to commit two more violations of the law before penalties can be imposed.

The fact that ITT has discontinued the illegal practice found in this case does not, of course, affect the Commission's power to prohibit it and similar practices. Were the law otherwise, a party before the Commission could always circumvent Commission action simply by stopping what they were doing until action against them ceased and then later resume the practice. E.g., William H. Rorer, Inc. v. Federal Trade Commission, 374 F.2d 622, 625-26 (2d Cir. 1967), and cases cited therein.

children,[38] who, as the Commission has found, were misled by that advertising. The record thus demonstrates the practical impossibility of segregating the audience who will view the advertisement. For the Commission to limit the order to the "intended" audience would allow ITT and Bates to continue the same misrepresentations found to have been made merely by saying that they did not intend to mislead a specific part of the audience. This would be true even though they are aware that substantial numbers of children will view the advertisement and be misled because ITT and Bates can claim the misleading was unintentional. Moreover, the same practice of making misleading claims can be as readily directed to other groups besides children.

In any event, the intentions of the advertiser are not controlling in determining whether the advertisement is deceptive. Montgomery Ward & Co., Inc. v. Federal Trade Commission, 379 F.2d 666 (7th Cir. 1967). But where an

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38/ The implied claim ITT makes that only advertising directed at children can be prohibited is without merit. The fact that ITT and Bates only intended to "hit" women between 18 and 49 with children under 18, as they contend, has little effect on who views the advertisements and is misled by them. As we have demonstrated, in at least one year the number of children who were in the audience misled was equal to the number of "intended" women and three-quarters of the audience was "unintended." Supra, p. 40 n. 31. Under this rationale an advertisement could be deceptive to three-quarters of the population of the country and yet not violate the law because the advertiser could claim he only "intended" to sway those who were not deceived. This, clearly, is not the law.

unsophisticated audience is the target of an advertising campaign, as children were in this case, it is a factor to be considered and one that argues forcibly for a strong order to prevent misleading the same group that was misled in the past, particularly where they are unsophisticated. S.S.S. Company, Inc. v. Federal Trade Commission, 416 F.2d 226, 231 (6th Cir. 1969); Tashof v. Federal Trade Commission, supra, 437 F.2d at 715.

In fact, it is particularly because of the lack of sophistication in children that an order covering all advertising is required in this case. Both the Commission and courts have long recognized the need for the special protection of children. See, e.g., Ideal Toy Corp., 64 F.T.C. 297 (1964); Federal Trade Commission v. R. F. Keppel & Bros., Inc., 291 U.S. 304 (1934). The record supports, and the Commission found, that the importance of correct nutritional advertising to children requires the prohibition of nutritional misrepresentations in this case. (App. 276.)

ITT and Bates contend that the order is overly broad because it prohibits the type of misrepresentation found in "any food product." (Brief of ITT at 39-42; Bates at 16-17.) The heart of this argument, which places primary reliance on National Dairy Products v. Federal Trade Commission, supra,

is that two products were charged and only a "single specific misrepresentation" was found.[39/]

This argument is substantially weakened by the fact that at its inception this proceeding involved the advertising of three products, Profile Bread, Wonder Bread and Hostess Cakes. Counsel for ITT and Bates indicated that a third of the case (the Profile aspect) had been settled. (App. 279.) In that settlement, ITT and Bates agreed not to make certain representations about bread alleged to be in violation of Section 5.

Broad orders by the Commission have been sustained in numerous cases. Thus, in Carter Products v. Federal Trade Commission, supra, 323 F.2d at 532, the allegations of the complaint were limited to specific misrepresentations of "Rise" shaving cream, but the order issued prohibited making such representation of "any other merchandise" sold by Carter. This included such dissimilar products as "Arrid" deodorant and "Little Liver Pills," a drug. In Niresk Industries, Inc. v. Federal Trade Commission, 278 F.2d 337, 343 (7th Cir. 1960), the misrepresentation alleged involved a single product, an

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39/ Ideal Toy Corp., supra, is an example of a case where the Commission considered charges against two products in a single generic group, dismissed most of them and entered an order banning misrepresentations of all products in the generic group. (See Brief of ITT at 39 and n. 40.) Similarly, in Federated Nationwide Wholesalers Service v. Federal Trade Commission supra, 398 F.2d at 258, this Court approved an order provision prohibiting deceptive advertising of all product lines where only three of the six lines examined (the same ratio as in this case) were found to support the allegation of deception.

electric cooler-freezer, yet the Commission prohibited the same type of misrepresentations for their entire line of kitchenwares. Upholding this order the court rejected an argument that the order be limited to the single product found to violate the law, stating:

> Petitioners marketed a large number of products in Commerce. They stand adjudged guilty of the use of illegal practices in the advertisement and sale of one product. We think it is entirely reasonable for the Commission to frame its orders broadly enough to prohibit petitioners' use of identical illegal practices for any purpose, or in conjunction with the sale of any and all of its products. [Id.]

In Albert Lane v. Federal Trade Commission, 130 F.2d 48 (9th Cir. 1942), the court upheld an order prohibiting misrepresentations like those found to be made in two publications in any other similar publication. Misrepresentations about aluminum cookware, dinnerware and silverware, in Consumer Sales Corp. v. Federal Trade Commission, 198 F.2d 404 (2d Cir. 1965), led this Court to uphold the prohibition of similar misrepresentations in the sale of "other merchandise." In Benrus Watch Co. v. Federal Trade Commission, supra, misrepresentations found with respect to watches also prohibited misrepresentations in connection with the sale of all Benrus products, whether or not related to the watch industry.

More recent decisions have also upheld broad orders by the Commission. In Western Radio Corp. v. Federal Trade

Commission, 339 F.2d 937 (7th Cir. 1964), the misrepresentation of six catalogue items lead to the prohibition of like practices for "any product." The Court of Appeals for the District of Columbia, in Giant Food Inc. v. Federal Trade Commission, supra, upheld an order prohibiting the misrepresentation of "any . . . merchandise" where the store used misleading advertising for a few of its products. This Court has reached a similar conclusion in William H. Rorer v. Federal Trade Commission, supra. There the respondent violated the law by engaging in illegal price discrimination, principally by discounting one product. The order approved by this Court ran not only to all pharmaceutical products, but to forms of price discrimination different than that found in violation of the law as well. Accord, Federated Nationwide Wholesalers Service v. Federal Trade Commission, discussed supra, p. 55, n. 39.

Finally, the Supreme Court in Federal Trade Commission v. Colgate-Palmolive Co., supra, upheld an order prohibiting misrepresentation, through the use of certain mock-ups, for "any product." That case involved a single product, "Rapid Shave," and "hitherto unexplored" questions in advertising practice by one of the respondents here, Bates. (Id., 380 U.S. at 380.) In the opinion of the Supreme Court, an order going to "any product" was warranted by the fact that Bates had prepared:

> . . . three different commercials which employed the same deceptive practice. This we believe gave the Commission a sufficient basis for believing that the respondents would be inclined to use similar commercials with respect to the other products they advertise. [Id., 380 U.S. 395.]

To determine the propriety of a broad order the specific circumstances of each case must be considered. (Id., 380 U.S. at 394.)

A decision, relied upon by Bates (Brief of Bates at 28), handed down shortly after the Supreme Court's decision in Federal Trade Commission v. Colgate-Palmolive Co., supra, also listed some factors that the Commission can consider in issuing a broad order. Joseph A. Kaplan & Sons, Inc. v. Federal Trade Commission, supra, 347 F.2d at 789 (1965). Included were:

> . . . the frequency and duration of the violations, the business and competitive history of the respondent, including evidence of past violations, and the likelihood that the respondent knew, or should have known, that its conduct was unlawful. [Id.]

More recently, in Tashof v. Federal Trade Commission, supra, the same Court upheld a cease and desist order applicable to "any article of merchandise" as a result of finding misrepresentations in the advertising of eyeglasses based only upon the practices of the violator established in that case.

The circumstances of this case compel an order that applies to nutritional advertising for "any food product." The Commission found that ITT and Bates misrepresented to

children that Wonder Bread was an extraordinary food for producing dramatic growth in children. This violation continued over several years and involved large expenditures of money. (App. 275.) The evidence of record indicates that the nutritional properties of products cannot be tested by the average consumer, although the advertising of them is an important factor in shaping consumer opinions about nutritional value. (App. 191.) Much of the advertising in question was addressed specifically to children, less sophisticated members of the public, and, even when they were not the "intended" audience, significant numbers of them saw, and were misled by the advertising in question. The Commission limited the order to the type of deception found, but applied it to all food products because deceptive claims of nutritional value can be used in the promotion of all foods, not just bakery products. (App. 227.) Finally, not just three deceptive advertisements were involved in this case, but two campaigns, each consisting of many advertisements, spread over a period of almost seven years. Clearly, under the standards established by the Supreme Court in Federal Trade Commission v. Colgate-Palmolive Co., the Court of Appeals for the District of Columbia Circuit in Joseph A. Kaplan & Sons, Inc. v. Federal Trade Commission and Tashof v. Federal Trade Commission, and this Court in William H. Rorer v. Federal Trade Commission and Federated Nationwide Wholesalers Service v. Federal Trade Commission, all supra, the practices of ITT and Bates in

perpetrating this long-standing deception on the most susceptible segments of our society provided the Commission with cause to believe that the practices would be used for other products and thus justify a broad order.

The reliance of ITT and Bates on National Dairy Products v. Federal Trade Commission, supra, is misplaced. The segment of the opinion they quote (Brief of ITT at 40; Bates at 17-18), refers repeatedly to the circumstances of the case. There the order the Commission imposed, in a case involving a violation of the Robinson-Patman Act, prohibited all price discriminations for all food products. The key fact leading to modification of this portion of the order was that originally three products were alleged to violate the Act, but the Commission dismissed the allegations with respect to two of the products and the order, as written, would have prohibited pricing practices customarily used in competition for the same two items that had been exonerated. In finding the single violation during the twenty-six day period involved the Commission itself had distinguished these pricing practices as being applicable to different products. In sum, there was no record evidence to support a broad product order that would operate against products exonerated in the same proceeding, especially when they had been found to be different. The facts of this case are radically different. The order here will not prohibit the advertising exonerated

in the other (Hostess) portion of this proceeding. The violation in the Wonder portion of this case was flagrant, of long-standing duration and clearly did not present a novel question. (App. 276.)

American Home Products Corp. v. Federal Trade Commission, 402 F.2d 232 (6th Cir. 1968), and its companion, Grove Laboratories v. Federal Trade Commission, 418 F.2d 489 (5th Cir. 1969), merely illustrates that each case must be determined on its facts. Both cases involved practices relating to a specific drug and differences between drugs may in certain cases justify differences in the coverage of the order. Here the gravamen of the complaint is the misrepresentation of the nutritional property of food, a property which all foods presumably have in common.

This Court too has spoken on when it will approve broad orders.[40/] In William H. Rorer v. Federal Trade Commission, supra, the respondent challenged an order that prohibited all forms of price discrimination because only a single kind of illegal discrimination had been found by the Commission. This Court considered most of the decisions cited by ITT and Bates (374 F.2d at 625) for limiting Commission orders and analyzed the factors in the case that justified a broad order. (374 F.2d at 625-26.) It concluded:

> In view of the disclosed magnitude, duration and clear illegality of . . . [the violation], we cannot say that the Commission's fear that

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40/ The requirement that the Commission find a party to be a "habitual violator" before it can impose a broad order is particularly unwarranted and clearly without legal support.

> . . . [the respondent] might be tempted to engage in other types of [similar violations] is unreasonable. Therefore, while we will not mechanically approve broad . . . orders -- and indeed suggest that careful fashioning of the orders best serves the legitimate interests of all concerned -- we conclude that . . . [the] contention is unjustified. [Id., 374 F.2d at 626.]

Again in National Dynamics Corporation v. Federal Trade Commission, 492 F.2d 1333 (2d Cir. 1974), this Court upheld an order provision prohibiting, inter alia, advertising claims which represent "that an independent laboratory has tested any product or that any laboratory test substantiates or supports performance claims unless they are substantiated . . . ." Id. 492 F.2d at 1336. The advertising in question there boldly proclaimed that the product touted had been "Laboratory Tested and Approved" and listed numerous performance features for the product. It was unchallenged that the product had been so tested and that some of the performance claims could be substantiated; however, the Commission found that one performance feature (duration of effect of the product) listed under the heading had not been tested.

Rejecting a challenge to the scope of the order which applied to all performance claims, this Court held (492 F.2d at 1336):

> Although petitioners contend that Paragraph 4 should, at most, prohibit only unsubstantiated durational claims, the paragraph as written appears reasonably related to the misrepresentations found by the Commission. Accordingly, we find no flaw in paragraph 4, FTC v. Colgate-Palmolive Co., 380 U.S. 374, 389-390, 85 S. Ct. 103, 1035, 13 L. Ed. 2d 904 (1965).

The decisions in William H. Rorer and National Dynamics, both supra, should be controlling in rejecting the contentions of ITT and Bates. It is clear that the Commission's order need not be limited to the precise misrepresentation found. A single unsubstantiated performance claim in National Dynamics was sufficient for this Court to uphold the Commission's prohibition against unsubstantiated claims for any performance characteristic. The requirements here for substantiation of claims for "any food product" therefore clearly are justified in view of the "disclosed magnitude, duration and clear illegality of . . . [this violation]," William H. Rorer, supra.

B. Each portion of the order is reasonably related to the violation found

The Commission's order is reasonably related to the violation found, that ITT and Bates falsely represented Wonder Bread as an extraordinary food for producing dramatic growth in children. Nothing in the order prevents any true representations that can be substantiated and includes the necessary disclosures. Paragraph 1 of the order contains four specific provisions. Subparagraph 1(a) prohibits representations of nutritional qualities of food products in generalized terms unless such claims can be substantiated for the average or ordinary use of the product by consumers or particular groups of consumers. In imposing this requirment the Commission pointed out that a part of the misrepresentation it found,

particularly as to the "extraordinary food" aspect, was conveyed through repeated and exaggerated references to the nutritional qualities of Wonder Bread. (App. 274.) In view of the trial tactics ITT and Bates employed, claiming that they did not know that the advertisements were making the misrepresentation found through the use of such generalized terms, it is not unreasonable to require them to be able to substantiate similar claims before they can be made in the future. A similar substantiation requirement was upheld where claims were made without checking facts that resulted in misleading consumers. In Tashof v. Federal Trade Commission, supra, 437 F.2d at 715, the court pointed out that "where a businessman has wrought a wrong on the public, he may be held to a reasonable business procedure that will prevent repetition of that wrong . . . ." This Court, in National Dynamics, Corp. v. Federal Trade Commission, supra and the Court of Appeals for the Sixth Circuit in Firestone Tire & Rubber Co. v. Federal Trade Commission, 491 F.2d 246 (6th Cir. 1973), have also upheld substantiation requirements for all claims for a product under similar circumstances. Although none of the generalized terms, alone or in themselves, made the misrepresentation found, they were an intregal part of it. The Commission, having found a violation, is entitled to foreclose alternate roads to the same general goal of deceiving the public. Federal Trade Commission v. National Lead Co., supra.

Paragraph 1(b) of the order requires affirmative disclosure, whenever the comparative nutritional value or efficacy of a product is made, to the brand, product or product category to which the comparison is made. The Commission held that the representation that Wonder Bread was an extraordinary food for producing dramatic growth in children com ares the product with others and holds it up as superior to at least some other foods. This is not inconsistent with the fact that Wonder Bread was not found by the Commission to be superior to all other foods. A finding that Wonder Bread is not unique does not mean that it was not represented as superior to some other products. (App. 275.) This provision is clearly related to such false claims of nutritional superiority, but far from prohibiting such claims, it only requires disclosure of a material fact if such a claim is to be made. Such affirmative disclosure provisions have often been upheld. E.g., J. B. Williams Co. v. Federal Trade Commission; S.S.S. Company, Inc. v. Federal Trade Commission, both supra.

Paragraph 1(c) again requires substantiation if a product is to be claimed as an essential source of some nutritional factor. Such a representation, if made, would be like the claim that Wonder Bread supplied "proteins, minerals, carbohydrates and vitamins . . . all vital elements for growing minds and bodies." (App. 275.)[41/] It is reasonably related

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41/ The fact that the Commission did not find the advertisements to make specific claims to adults that Wonder Bread was "essential" or "necessary" is not a bar to prohibiting claims of essentiality since such claims are closely related to the violation found.

to the violation found that ITT and Bates have misrepresented Wonder Bread as having extraordinary properties for growth.[42]

Paragraph 1(d) is designed to prevent demonstrations or visual techniques that purport to represent the functional value of a product inaccurately, like the growth sequence used in this case. It is clearly related to the violation found, and its terms are virtually the same as those approved by the Supreme Court in Federal Trade Commission v. Colgate-Palmolive Co., supra. (App. 276.)

Paragraph 2 prohibits the exact type of misrepresentation found in this case, and even ITT concedes that it resembles the violation found. (Brief of the ITT at 45; Bates at 39-41.) Neither ITT or Bates challenged this order provision before the Commission and they are precluded from raising it for the first time on appeal. Braniff Airlines v. Civil Aeronautics Board, supra; W.M.R. Watch Case Corp. v. Federal Trade Commission, 343 F.2d 302, 304 (D.C. Cir. 1965), cert. denied 381 U.S. 936.[43]

Paragraph 3 prohibits misrepresentation of the nutritional content, efficacy or functional value of any food product.

42/ The legal support for such a provision is the same as that for Paragraph 1(a), supra, p. 64.

43/ The merit to the requirement that a challenge be made before the agency first is demonstrated in this case where the motions for reconsideration challenged Paragraphs I(a), (b), (c), (d) and III and the Commission modified Paragraph I(a) in its opinion on reconsideration.

Clearly it is related to the violation found.[44/] That violation was, of course, a misrepresentation of the nutritional value of Wonder Bread. It was a deception perpetrated for several years, involving a series of advertisements in two separate campaigns. It involved millions of dollars in sales. It involved the deception of a large number of the least sophisticated members of society on a matter of great importance to them, nutrition, which they are not able to test for themselves. As in Colgate-Palmolive Co., supra, there is clearly a sufficient basis in the violation found to prohibit similar violations in the future. As in Tashof and Kaplan, nothing in the order prohibits truthful advertising of nutritional values where generalized representations are made if they can be substantiated, or if they include an affirmative disclosure in a limited respect. The order does not prohibit the advertising of other attributes of food products, such as freshness or taste. Even the First Circuit, in finding the order against Colgate-Palmolive Company too broad, pointed out that by requiring disclosure by the advertiser of the mock-up nature of a demonstration the Commission:

44/ Bates did not challenge Paragraph III as not reasonably related to the violation either before the Commission (App. 253) or in the prior Brief filed before the D.C. Court of Appeals. They must be considered to have abandoned their claim that Paragraph III is vague, asserted before the D.C. Court of Appeals.

> . . . allowed . . . an escape, rather than imposed a burden. We see no reason why advertising agencies, which are now big business, should be able to shirk from at least prima facie responsibility for conduct in which they participate. [Colgate-Palmolive Co. v. Federal Trade Commission, supra, 326 F.2d at 523-24, rev'd on other grounds, 380 U.S. 374 (1965),]

ITT argues (Brief of ITT at 43) that the Commission cannot prevent the use of the generalized term "enriched" because the Federal Food, Drug and Cosmetics Act, 21 U.S.C. §§ 331(b), 343(b), 333 (1970), and the regulations promulgated thereunder (21 C.F.R. § 17.2) require that term to be used. That Act, of course, has no application to advertising. The regulation, like the statute, applies only to labeling. Furthermore, as used in these advertisements, the order does not prohibit the use of the word "enriched" when it is used as part of the descriptive title of the product, but only when that term is used generally to imply that the product has some special feature, i.e., "carefully enriched with foods for body and mind . . . ." (Supra at p. 7.)

Bates' contention that the order issued in this case would prohibit a representation like that approved in Coca-Cola Co., 3 CCH Trade Reg. Rep. ¶ 20,470 (FTC 1973), is without foundation in fact. The order imposed would allow them to make such a representation but requires that they substantiate such a claim before they make it. The difference between the Coco-Cola Co. case where the claim was substantiated after it was made

and the instant case that justifies the distinction is that Bates has been found to have violated the law and in Coca-Cola Co. such a violation did not exist.

C. The Commission could properly consider consent orders agreed to by Bates

Bates objects to the fact that the Commission considered, among other factors, the fact that Bates agreed to numerous consent orders in determining whether it would be appropriate to issue an order covering "any food product." (Brief of Bates at 30-34.) The Commission considered this factor, however, because Bates contended that one-third to one-half of its business would be destroyed if a broad order was entered against it. Furthermore, these consent orders were only considered in conjunction with the flagrant violation found in this case, and a similar past flagrant violation by Bates which also involved the abuse of a demonstration which implied that it represented reality. Federal Trade Commission v. Colgate-Palmolive Co, supra.

To fashion their argument Bates correctly points out that consent orders before the Commission contain clauses that provide the agreement is for "settlement purposes only" and that the party settling the case does not admit that it violated the law. They refer to a case which they would have this Court believe established a rule that a consent order

cannot be considered by an administrative agency for any reason. This argument suffers from the defect that the case they cite, National Labor Relations Board v. Operating Engineers Local 926, 267 F.2d 418, 420-21 (5th Cir. 1959), deals with policies of the National Labor Relations Board and not the practices of the Federal Trade Commission.[45/] (Brief of Bates at 36-37.) There the court rejected the use of two consent orders entered in prior proceedings based on the complaints of another employer and the trade association he was a member of as the sole basis for entering a broad order against the union.[46/] The National Labor Relations Board made a policy decision after the decision in National Labor Relations Board v. Operating Engineers Local 926, supra, not to consider consent orders as establishing a "proclivity" on the part of a party to engage in conduct violative of the Act. This history has no applicability to the present

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45/ This Court, in National Labor Relations Board v. Local 282, International Brotherhood of Teamsters, 428 F.2d 994, 999-1000 (2d Cir. 1970), cited by Bates (Brief of Bates at 33), rejected, as the Commission does here, a contention that consent orders formed the only basis for a broad order. See infra, p. 72. This Court held that Operating Engineers established a rule "that facts not otherwise established except by the consent judgement itself will not adequately establish a proclivity for unlawful action so as to justify a broad injunction." Such a rule has no application here.

46/ The Court also noted with concern, just before the long quotation Bates sets out, that a broad order was not sought before the Hearing Examiner. A broad order was requested at all times in this case. When read in conjunction with the quotation it is clear that the court was concerned with the substitution of consent orders alone for facts in the record to support the broad order. Such facts are not lacking in this record.

case since the policies of one agency are not binding upon another. (See, e.g., 1-B, J. Moore, Federal Practice, ¶ 0.403 (1971 ed.).)

Unlike the Labor Board, however, the Commission has a long policy of considering prior consent orders by parties before it, not as evidence of past violations, for clearly there is not an admission of a violation, but as an indication of past practices of a party, in coming "perilously close to an area of proscribed conduct . . . ." Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952). Courts have traditionally recognized the appropriateness of this practice by the Commission. Thus, in Federal Trade Commission v. Colgate-Palmolive Co., supra, 380 U.S. at 399 (dissenting on other grounds), Mr. Justice Harlan said:

> There is some indication, however, that the Commission has had troubles with both respondents in the past (see 59 F.T.C. 1452, 1473 and n. 30). If the Commission should find that a pattern of misrepresentations by respondents creates a substantial risk that they will not accurately portray experiments if permitted to continue using mock-ups, the Commission's present order might well be justified. (Emphasis added.)

The Commission in the referenced opinion had, just as in this case, considered two prior consent orders involving Bates and the other party to the proceeding there.

The Fifth and Sixth Circuits have also considered consent orders agreed to by parties before the Commission as

indicative of past practices which may justify a broad order. Grove Laboratories v. Federal Trade Commission; American Home Products Corp. v. Federal Trade Commission, both supra.

More important, there was, in this case, unlike National Labor Relations Board v. Operating Engineers Local 926, supra, adequate evidence of record under the Supreme Court's test in Federal Trade Commission v. Colgate-Palmolive Co., supra, and the test of this Court in Rorer, supra, to justify a broad order. This case concerns a relatively common misrepresentation, not a novel issue which would normally militate against a broad order. Here there were long-lasting, pervasive, misrepresentations, not just the preparation of three advertisements which the Supreme Court in Federal Trade Commission v. Colgate-Palmolive Co., supra, held "gave the Commission a sufficient basis for believing that the respondents would be inclined to use similar commercials with respect to the other products they advertise." 380 U.S. at 395. Two campaigns covering almost seven years and involving numerous advertisements containing the same misrepresentation were involved. Similar facts in Tashof v. Federal Trade Commission, supra, resulted in a broad order for a flagrant violation which was, as here established by the record.

Joseph A. Kaplan & Sons, Inc. v. Federal Trade Commission, supra, 347 F.2d at 789, listed several other factors to consider in

determining whether a broad order was supportable. We have demonstrated that there is support in the record for the Commission's finding of each of those factors in this case. The frequency and duration of the violation in this proceeding is clearly established. The history of Bates as a past violator using a similar mode of deception, with or without its history of coming perilously close to an area of proscribed conduct (consent orders), and the likelihood that Bates knew or should have known that its conduct was unlawful (a finding by the Commission that Bates does not challenge here) all mandate affirmances of a broad order if variations of its past illegal practices are to be prevented. Nor does Bates, despite its suggestion to the contrary (Brief of Bates at 18-19), fall within the negative factors which might militate against a broad order. Clearly false advertising has been recognized as a violation prior to this case, even when directed at an unsophisticated group. R. F. Keppel & Bros. Co. v. Federal Trade Commission, 291 U.S. 304 (1934); Tashof v. Federal Trade Commission and S.S.S. Co. v. Federal Trade Commission, both supra. The violation here was as flagrant as that found to be "blatant" in Colgate-Palmolive Co. v. Federal Trade Commission, supra, 326 F.2d at 532. The "single" violation here is not the type of violation that requires reversal, involving, as it did massive deception over of long period of time. Finally, the argument that the Commission's order may harm Bates' business is both speculative and unpersuasive. Surely

it does not mean to suggest that all its advertising for food products contain nutritional misrepresentations. But even if it did, the practice must give away, not the Commission order. Federal Trade Commission v. Colgate-Palmolive Co., supra; S. Dean Slough v. Federal Trade Commission, 396 F.2d 870, 872 (5th Cir. 1968).[47/]

Thus, assuming, arguendo, that this Court would find error in the Commission's consideration of prior consent orders, reversal would not be required since there is an adequate independant basis in the record on which to uphold the findings without reference to the consent orders. Stanley Works v. Federal Trade Commission, supra, 469 F.2d at 508 n. 24; Tashof v. Federal Trade Commission, supra, 437 F.2d at 713 and n. 31 and cases cited therein.

The order of the Commission is supported by substantial evidence in all respects and is reasonably related to the violation found and should be upheld by this Court.

47/ One additional case on which Bates places primary reliance for its argument against a broad order is clearly inapplicable. (Brief of Bates at 18.) The order held to be too broad in Swannee Paper Corp. v. Federal Trade Commission, 291 F.2d 833, 837 (2d Cir. 1961), cert. denied, 368 U.S. 987 (1962), prohibited future violations in the words of the statute and involved a minor violation. Obviously neither factors apply here.

D. The order issued by the Commission is not unduly vague

Several provisions of the Commission's order are challenged as being too vague, ambiguous and "meaningless" 48/ (Brief of Bates at 35.) If this is true, it is because Bates refuses to consider, as this Court will, the provisions of the order in the context of the proceeding that was held before the Commission. An order of an agency is not read in the abstract, but with reference to the findings of the agency, in light of the language that it uses and in light of the record of the proceeding below. Swift & Co. v. United States, supra, 393 F.2d at 256. To withstand a broadside charge of vagueness, the order need only be "as specific as the circumstances permit." Federal Trade Commission v. National Lead Co., supra, 393 U.S. at 431.

Because the Commission's Rules of Practice, 16 C.F.R. § 3.61(d), (e) (1970), (1) permit a violator to ascertain in advance of embarking on a course of action whether it will violate the order, and (2) provide that good faith reliance on Commission advice will preclude the finding of a violation, most of the potential harmful effects conjured up by Bates

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48/ If the provisions are meaningless one wonders why Bates is challenging them.

are nonexistent. Both the Supreme Court and other courts have recognized that this procedure alleviates the need for mathematical precision in a Commission order. E.g. Federal Trade Commission v. Colgate-Palmolive Co., supra, 380 U.S. at 394; Giant Food Inc. v. Federal Trade Commission, supra, 322 F.2d at 986. See also Trans-World Airlines, Inc. v. Civil Aeronautics Board, 385 F.2d 648, 658 (D.C. Cir. 1967).

The first challenge Bates lodges is against Paragraph 1(b) of the order which prohibits it from making comparative claims about the nutritional efficacy or value of a product without stating the brand, product or product category to which the comparison is being made. The heart of its objection to the affirmative disclosure requirement seems to be that since the Commission found this was an implied claim (which the Commission also found, and Bates does not challenge, that Bates knew or should have known was being made) it is inhibited in making nutritional claims that are truthful. This is, of course, not true. It can make any truthful claim for a product as long as it does not perpetuate the violation of the law it was held to have committed. If it wishes to advertise a product as "a useful source of protein," it may as long as it indicates to what the product is being compared.

The reason for the distinction between the representation it is allowed to make and those approved in Coca-Cola Co., supra, is that Bates has violated the law. This is the kind

of "fencing in" the law allows. Referring to a decision of this Court one court has stated:

> . . . we have long since passed the point where the power of the Commission to reach statements that are deceptive because they contain less than the whole truth can be doubted. E.g., Ward Laboratories, Inc. v. Federal Trade Commission, 275 F.2d 925, 954 (2d Cir.), cert. denied, 364 U.S. 827 (1960). [Tashof v. Federal Trade Commission, supra 437 F.2d at 714 n. 37.]

See also cases cited supra, at 49. It is precisely because the Commission found that similar half-truths led to the misrepresentation found in this case that it is prohibited from making only half-truthful statements in the future.

Bates' objection to subparagraph 1(d) is specious. The Commission pointed out that it was directed at items like the growth sequence which through the use of photography of real children implied, and children and some parents were misled into believing, that the result or benefit depicted could be derived from eating Wonder Bread. A similar misrepresentation by Bates in Federal Trade Commission v. Colgate-Palmolive Co., supra, which implied a product was being demonstrated to the viewers, led to a similar prohibition that was "as specific as the circumstances would permit." (Id., 340 U.S. at 393.) The Commission's opinion on reconsideration makes clear that the provisions were included because of the growth sequence. This clarifies any ambiguities that may exist from the truncated reading Bates finds advantageous. In light of the Commission's opinion (App. 276)

it is clear that this subparagraph does not outlaw the Jolly Green Giant. "Actual depiction" of taste, freshness, the contents of Vitamin C, etc. (Brief of Bates at 39), are not required unless Bates undertakes, as it did in this case and in Colgate, to create the appearance of demonstrating the product or what it can do for the consumer.

The contention Bates advances against Paragraph 2 of the order is an obvious makeweight.[49/] Bates suggests that there are some foods that will provide substantial benefit for making significant contributions to proper growth. But it names none. The uncontradicted evidence of record indicates that no food provides growth since it is a biological function of cells. The provisions of the order in this regard are clearly related to the violation found. The prohibition extends to exactly the type of misrepresentation that Bates was found to knowingly perpetrate on children for a long period of time. Even ITT admits that the order is related to the violation found, feeling only that it is too broad. (Brief of ITT at 42.) However, in view of the Commission's finding, based upon the evidence of record that no food provides for proper growth in children, it clearly is not overly broad in that regard. This is precisely the type of

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49/ The Court should not consider this issue since neither ITT or Bates is entitled to challenge this provision. See supra, p. 66.

order that will prohibit alternate paths to the same goal of misleading children that ITT and Bates have been found guilty of in this case. Federal Trade Commission v. Ruberoid Co., supra.

E. The Commission is not required to accord a violator of the Federal Trade Commission Act with a defense to future violations in the cease and desist order it imposes

The final claim made by Bates is that the Commission must include a "knew or had reason to know" clause in any order it issues to an advertising agency. (Brief of Bates 41-44.) The heart of this argument seems to be that, by the failure to include a "knew or had reason to know" clause, Bates and advertising agencies generally will be held to a standard of strict or absolute liability for any representation they make. This simply is not true.

The law has long been clear that the difference between an agent and a principal may be controlling in determining liability for various actions, but simple status as one or the other has no effect. In Carter Products v. Federal Trade Commission, supra, an order directed to an advertising agency, which, like the order in the instant case, did not contain a "knew or should have known" clause, was approved in the face of the contention that the advertising agency should not be responsible for unknowingly carrying out the

orders of its principal.[50/] The Court considered whether:

> . . . one carrying out the will of another [is] to be held responsible for the results of his actions? It appears to us that the proper criterion for deciding this question should be the extent to which the advertising agency actually participated in the deception. This is essentially a problem of fact for the Commission. [Id. at 534.]

Two years later the Supreme Court noted the issue in passing and said in Federal Trade Commission v. Colgate-Palmolive Co., supra, 380 U.S. 382 n. 8:

> An additional clause was added to the order for the benefit of respondent Bates in recognition of the different positions of clients and advertising agencies, which often do not have all the information about a product that the client has. The clause reads: "provided, however, that it shall be a defense hereunder that respondent neither knew nor had reason to know that the product, article or substance used in the test, experiment or demonstration was a mock-up or prop." [Emphasis added.]

More recently, in Doherty, Clifford, Steers & Shenfield, Inc. v. Federal Trade Commission, 392 F.2d 921, 927-929 (6th Cir. 1968), the rationale of Federal Trade Commission v. Colgate-Palmolive Co., supra, was followed. The court noted that the order prohibiting future misrepresentations contained a clause that would adequately protect the advertising agency from unwarranted liability. This clause provided: ". . . it shall be a defense hereunder that respondent neither

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50/ In J. B. Williams Co., Inc. v. Federal Trade Commission, supra, an order without such a clause was also approved. See 72 F.T.C. 865 (1967).

knew or had reason to know of the falsity or deceptive capactiy of such advertisement." (Id. at 929.) (Emphasis added.)

In the opinion the court quoted, with apparent approval, a portion of the opinion of the Commission in the case in which it rejected a claim that submission of the advertising to a legal department would make out the defense that the agency neither knew of should have known the advertising was false,[51/] holding:

> The agency, more so than its principal, should have known whether the advertisements had the capacity to mislead or deceive the public. This is an area in which the agency has the expertise. Its responsibility for creating deceptive advertising cannot be shifted to the principal who is liable in any event. [Id., 392 F.2d at 927 n. 4.]

The Commission in its opinion here (App. 226), recognized the existence of a defense for an advertising agency in some cases when it said:

> An agency is clearly liable for the advertising it has created, produced, or assisted in producing unless it can be shown that it did not know or could not know that the challenged advertising was false. [Citing Carter and Doherty, both supra.]

But it also made clear what the court had earlier approved in

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51/ Bates has added a new twist to this argument, contending to this Court that the submission of advertising to a legal department is proof that its violation is not flagrant. (Brief of Bates p. 18, n. 9.) But before the Commission it contended this was a defense, a contention the Commission rejected (App. 227).

Carter Products v. Federal Trade Commission, was still the policy of the Commission when it stated:

> It [the advertising agency] cannot make sweeping absolute claims or ambiguous claims and later assert in defense to charges of misrepresentation that it had no reason to know that the state of scientific knowledge on which these claims rested would not support them in the form in which they were made in the advertisement. [App. 226.]

Taken together these two statements indicate the Commission's consistent position, affirmed by the courts, that an advertising agency's ability to know is a matter that can be inferred in the absence of the assertion that the advertising agency was misled. Once asserted, the defense, resting primarily on being misled by a third party, becomes a question of fact for the Commission. It is clear from the applicable law that no judicial precedent requires the inclusion of a "knew of should have known" clause as a defense to liability by the advertising agency. Some orders have been approved without such a clause and others with such a clause.

The assertion of Bates that the "Commission has also recognized that 'know or had reason to know' language should be included in orders entered against advertising agencies" is at best a curious position for it to take. (Brief of Bates at 42.) It refers this Court to several consent orders entered between 1969 and 1972, which include

a "knew or had reason to know" clause.[52/] During the same period the Commission accepted consent orders from other parties prohibiting similar misrepresentations by advertising agencies, which did not include a "knew or should have known" clause. Two of them, for example, involved Bates and one of those also involved ITT. In the Matter of ITT Continental Baking Company, Inc., et al., 79 F.T.C. 248, 254-55 (1971); In the Matter of Ocean Spray Cranberries, Inc., et al., 80 F.T.C. 975, 981-83 (1972). Others involved other advertising agencies, e.g., In the Matter of J.B. Williams Company, Inc., et al., 79 F.T.C. 410, 418-20 (1971). Under its rationale perhaps this Court should conclude that Bates recognizes the inappropriateness of such a clause and the absence of such a defense. More likely, however, the different treatment accorded such clauses is an indication that in the case of consent orders, the existence of such clauses, whether they are included as willfulness clauses or as providing defenses, is a matter that is traded off in the negotiation

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52/ The proposed orders and consent order provisions they set out at 42-43, lead to some confusion. The cited orders are in effect, willfulness clauses, requiring affirmative proof of knowledge before the Commission. If Bates means to suggest that such a clause must be included in the order it is inconsistent with its argument that the order must provide a defense. Clearly a flagrant violator of the law need not be proven willful to be held accountable for future violations. The distinction the Commission makes in the omitting or including the various types of clauses is, of course, indicative of the fact that each case is treated under its own circumstances.

procedure between the parties. Similarly, in litigated cases, the inclusion of such clauses and the form they take is a function of the nature of the offense.

In short, both judicial precedent and Commission practice establish that the form a Commission order takes with regard to a "knew or should have known" clause, and whether it is included at all, depends upon the circumstances of each case. Far from "routinely" including these clauses in all orders, as Bates contends (Brief of Bates at 41), the preceding paragraphs demonstrate that the Commission wisely exercises its discretion in their use. Bates' attempt to portray the Commission's failure to include such a clause as arbitrary is demonstrably lacking in a factual predicate and should be rejected for that reason. And, like the argument that the order should be limited to a single product, it is an attempt to gain judicial sanction from this Court to allow it to engage in a second and third violation of the law before any penalty is imposed upon it.[53/]

53/ Notwithstanding the lack of legal merit to Bates' argument, if this Court concludes on the record in this case that the inclusion of such a clause is appropriate, the Commission would not object to a modification of the order that would provide:

> Respondent Ted Bates and Company, Inc., shall have a defense for false advertising representations under this order where it neither knew nor had reason to know that the representations were false.

No court has ever required the inclusion of such a clause in an order directed at a violator of the law. Furthermore, Bates has failed to demonstrate that the Commission either acted arbitrarily or abused its discretion by not including this clause in its order.

CONCLUSION

Wherefore, it is respectfully submitted that the Commission's order to cease and desist should be affirmed and enforced in its entirety.[54/]

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54/ "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, Section 5(c), 15 U.S.C. § 45(c).

ADDENDUM

Statutes and Regulations Involved

1. Relevant provisions of Sections 5, 12 and 15 of the Federal Trade Commission Act (15 U.S.C. §§ 45, 52, 55) are as follows:

§45. Unfair methods of competition unlawful; prevention by Commission--Declaration of unlawfulness; power to prohibit unfair practices

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

* * *

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission to cease and desist from the violation of the law so charged in said complaint. Any person, partnership or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state

its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice . . . .

* * *

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside . . . .

§52. Dissemination of false advertisements--Unlawfulness

(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement--

(1) By United States mails, or in or having an effect upon commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices or cosmetics.

Unfair or deceptive act or practice

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 45 of this title.

§55. Additional definitions

For the purposes of sections 52 to 54 of this title--

False advertisement

(a)(1) The term "false advertisement" means an advertisement, other than labeling which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual . . . .

2. Relevant provisions of the Rules of Practice of the Federal Trade Commission (16 C.F.R. § 3.61(d)(e)) are as follows:

§3.6. Reports of compliance

(d) Any respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order. The request for advice should be submitted in writing to the Secretary of the Commission and should include full and complete information regarding the proposed course of action. On the basis of the facts submitted, as well as other information available to the Commission, the Commission will inform the respondent whether or not the proposed course of action, if pursued, would constitute compliance with its order. A request ordinarily will be considered inappropriate for such advice: (1) where the course of action is already being followed by the requesting party; (2) where the same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding, order, or decree initiated or obtained by the Commission or another governmental agency; or (3) where the proposed course of action or its effects may be such that an informed decision thereon cannot be made or could be made only after extensive investigation, clinical study, testing or

collateral inquiry. Furthermore, the filing of a request for advice under this subsection does not in any circumstances suspend or relieve a respondent from his obligation under the law with respect to his compliance with the order. He must in any event be in full compliance on and after the date the order becomes final as prescribed by statuted referred to in paragraph (b) of this section. Advice to respondents under this paragraph will be published by the Commission in the same manner and subject to the same restrictions and considerations as advisory opinions under §1.4 of this chapter.

(e) The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission. The Commission will not proceed against a respondent for violation of an order with respect to any action which was taken in good faith reliance upon the Commission's approval or advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of recission or revocation of the Commission's approval.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ITT CONTINENTAL BAKING COMPANY, INC. Petitioner, v. FEDERAL TRADE COMMISSION, Respondent.	)	No. 75-4141
TED BATES & COMPANY, INC. Petitioner, v. FEDERAL TRADE COMMISSION, Respondent.	)	No. 75-4141

CERTIFICATE OF SERVICE

I hereby certify that I have today served the Brief for Respondent Federal Trade Commission, by mailing two copies thereof, forst class postage prepaid, to counsel for Petitioners as follows:

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